(10)

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. ~~391~~ 47

SAMUEL W. LAMBERT, APPELLANT,

vs.

EDWARD C. YELLOWLEY, AS ACTING FEDERAL PROHIBITION DIRECTOR; DAVID H. BLAIR, AS COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM HAYWARD, AS UNITED STATES ATTORNEY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

FILED FEBRUARY 28, 1925

(30,912)

(30,912)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925

No. 301

SAMUEL W. LAMBERT, APPELLANT,

vs.

EDWARD C. YELLOWLEY, AS ACTING FEDERAL PROHIBITION DIRECTOR; DAVID H. BLAIR, AS COMMISSIONER OF INTERNAL REVENUE, AND WILLIAM HAYWARD, AS UNITED STATES ATTORNEY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 15, 1925

[fol. 1] **IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK**

E25-108

SAMUEL W. LAMBERT, Complainant,

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; David H. Blair, as Commissioner of Internal Revenue, and William Hayward, as United States Attorney, Defendants

NOTICE OF APPEAL AND ORDER ALLOWING SAME—Filed June 13, 1923

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Edward C. Yellowley, Acting Federal Prohibition Director and David H. Blair, Commissioner of Internal Revenue by William Hayward, United States Attorney for the Southern District of New York and William Hayward, United States Attorney for the Southern District of New York in person, feeling aggrieved by the interlocutory [fol. 2] decree made and entered in the District Court of the United States for the Southern District of New York on the 29th day of May, 1923, in the above entitled suit granting an injunction pendente lite as prayed for in the bill of complaint herein, do hereby appeal from said decree to the Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignments of error hereto annexed and filed herewith and pray that this appeal be allowed and that a transcript of the papers and proceedings upon which said decree was made duly authenticated be sent to the said Circuit Court of Appeals for the Second Circuit.

Dated, New York, June 12th, 1923.

William Hayward, United States Attorney, Solicitor for Appellant-Defendants, Yellowley and Blair, and in Person.

Appeal as prayed for is hereby allowed.
Dated New York, June 12, 1923.

John C. Knox, United States District Judge.

[fol. 3] IN UNITED STATES DISTRICT COURT

SUBPŒNA—Filed November 22, 1922

The President of the United States of America to Edward C. Yellowley, as Acting Federal Prohibition Director; David H. Blair, as Commissioner of Internal Revenue, and William Hayward, as United States Attorney, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Samuel W. Lambert and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of Two hundred and fifty Dollars ($250).

Witness Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 18th day of November in the year One Thousand Nine hundred and Twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

Alex. Gilchrist, Jr., Clerk. Davies, Auerbach & Cornell, Complainant's Solicitors.

The defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service, otherwise the bill aforesaid may be taken pro confesso.

Alex. Gilchrist, Jr., Clerk. (Seal.)

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

SAMUEL W. LAMBERT, Complainant,

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; David H. Blair, as Commissioner of Internal Revenue, and William Hayward, as United States Attorney, Defendants

BILL OF COMPLAINT—Filed Nov. 18, 1922

To the Honorable Judges of the District Court of the United States, Southern District of New York, sitting in equity:

The complainants, by Davies, Auerbach & Cornell, his attorneys, for his bill of complaint against the defendants, respectfully shows:

First. The complainant is a citizen and resident of the State of New York, residing in the County of New York.

Second. The defendant, Edward C. Yellowley, is an agent of the Commissioner of Internal Revenue, duly appointed under the provisions of the National Prohibition Act; the defendant, David H. Blair, is the Commissioner of Internal Revenue, and the defendant [fol. 5] William Hayward is the United States Attorney for the Southern District of New York. All said defendants are charged with the duty of enforcing the National Prohibition Act in the County of New York and elsewhere in the Second Collection District of New York.

Third. This is a suit of a civil nature arising under the Constitution and laws of the United States. The matter in controversy exceeds the sum or value of Three thousand Dollars ($3,000), exclusive of interest and costs.

Fourth. For the purpose of protecting the health and lives of its citizens against disease, the State of New York has from time to time enacted laws requiring that the persons practicing medicine must be specially educated and trained as physicians, and that advice in regard to the use of medicines and drugs as an incident of medical treatment should be given only by persons educated and trained for the medical profession. The said State has also provided by law that when so educated and trained and authorized to practice in accordance with the said laws, and not otherwise, physicians may give advice in regard to the use of medicines and drugs as an incident of medical treatment.

Fifth. Heretofore and in the year 1885, complainant, after having expended time and money in regularly prescribed training and studies to that end, was duly authorized by the State of New York to practice, and acquired the right to practice, medicine in the healing and curing of the sick and in the protection of human beings against attacks of disease, and ever since complainant has been con- [fol. 6] tinuously in the practice of such profession and is now practicing the same and enjoys a good reputation and standing as a physician.

Sixth. It is an essential part of complainant's right as a physician and of his duty toward his patients to treat their diseases and promote their physical well-being according to the untrammeled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such medicines and medical treatmem as in his opinion are best calculated to effect their cure and establish their health. By practicing medicine the complainant is authorized to and does hold himself out to the world as willing to place at the service of patients such skill and judgment as are above described, to the full extent of his ability.

Seventh. According to the usage and practice of the medical profession, long established and generally accepted, physicians, in advising the use of drugs and medicines, do so by written statements containing explicit directions as to the time and manner of administration and as to the quantities to be used. Such written state-

ments and directions are called prescriptions. In issuing a prescription the physician assumes no responsibility and exercises no control in respect to procuring the drugs or medicines prescribed, but merely expresses his judgment as to what the needs of the patient require for the restoration of health.

Eighth. It is the belief and judgment of the complainant based upon his experience and observation and the study of medical science, that the use as medicine of spirituous liquors to be taken [fol. 7] internally is, in certain cases, necessary for the proper treatment of patients in order to afford relief from known ailments. By spirituous liquors, complainant means liquors containing more than one-half of one per cent of alcohol by volume, including brandy, whiskey and wine.

Ninth. In prescribing drugs and medicines, the determination of the quantity to be used involves a consideration of the physical condition of the patient, and of the probable effect thereon of such drugs and medicines in each specific case. It is the belief of complainant, based upon his experience and observation and the study of medical science, that in the use of spirituous liquors as medicine it is in certain cases, including cases now under complainant's observation and subject to his professional advice, necessary, in order to afford relief from some known ailment, that the patient should use internally more than one pint of such liquor in ten days and that it is in certain cases necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant conceives it to be his duty and intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment.

Tenth. Complainant has never prescribed and does not intend to prescribe the use of liquor for beverage purposes. Complainant does not intend to advise or prescribe the use of liquor as medicine unless, after careful physical examination of the patient, he in good faith believes that the use of such liquor as medicine by the patient is [fol. 8] necessary and will afford relief to him from some known ailment.

Eleventh. By Section 7 of Title II of the National Prohibition Act it is provided in respect to physicians:

"No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days."

Similar provisions limiting the amount of vinous or spirituous liquor that may be prescribed for the use of any one person during any period of ten days are contained in the Act signed by the President on the 23d day of November, 1921, entitled "An Act supplemental to the National Prohibition Act."

Section 29 of the National Prohibition Act purports to make a violation of any of its provisions a crime and purports to subject the offender to fine or imprisonment or both. Like penalties are provided for a violation of the above mentioned supplement to said Act.

Twelfth. Neither the National Prohibition Act nor the above men- [fol. 9] tioned supplement purports to regulate the use for beverage purposes of spirituous liquors lawfully possessed, nor does either of said Acts prohibit the giving by any person of advice in respect to such use or the quantities to be used. Neither of said Acts purports to regulate the use for medicinal purposes of spirituous liquors lawfully possessed, otherwise than under a physician's prescription, and neither Act purports to regulate the giving of advice in regard to such use except in the case of physicians' prescriptions.

Thirteenth. Complainant is advised and respectfully represents to the court as matter of law, that so much of the National Prohibition Act as purports to prohibit physicians from advising or prescribing the use, internally, for medicinal purposes by any person of more than one pint of spirituous liquor within any period of ten days, and so much of the said Act entitled "An Act supplemental to the National Prohibition Act" as purports to limit the quantity of vinous or spirituous liquor that may be advised or prescribed by a physician for use, internally, for medicinal purposes by any person within the same period, are and each of them is beyond the authority conferred upon Congress by the Eighteenth Amendment to the Constitution of the United States, or otherwise, and are void and of no effect.

Fourteenth. The defendants have claimed and publicly stated that they will prevent, and have threatened by legal proceedings charging complainant with crime and attempting to subject him to fines and imprisonment, to prevent the complainant from prescribing for use as medicine to be taken internally by any patient within [fol. 10] any period of ten days, more than one pint of spirituous liquor, even though in complainant's best judgment, after careful physical examination of the patient, such use is necessary in order to afford relief from some known ailment. Such threatened proceedings would seriously interfere with complainant's ability to practice his profession and would subject him to irreparable damage.

Fifteenth. The threats and public statements herein complained of are directed not only against plaintiff but against other physicians of like belief and judgment in respect to the matters aforesaid, under like circumstances, and are therefore a matter of common concern to many physicians and to many patients. At a meeting of the Association for the Protection of Constitutional Rights, an associa-

tion of physicians having an extended and responsible practice, there was duly adopted a resolution of which a copy, with the names of some of the members of said Association, is hereto annexed, marked "Exhibit A."

Sixteenth. For the matters herein alleged the complainant has no adequate remedy at law.

Wherefore, the complainant respectfully prays an injunction, both permanent and temporary, restraining the defendants from interfering with complainant in his acts as a physician in prescribing vinous or spirituous liquors to his patients for medicinal purposes, upon the ground that the quantities prescribed for the use of any one person in any period of ten days exceed the limits fixed by said Acts, or either of them.

And the complainant prays that the court by its decree declare unconstitutional so much of the Act of Congress designated as the National Prohibition Act and so much of the Act of Congress signed [fol. 11] by the President on the 23d day of November, 1921, entitled "An Act Supplemental to the National Prohibition Act," as are herein complained of.

And the complainant further prays for such other and further relief as may be just, including such preliminary restraining order as will protect the complainant's rights; and further prays that a writ of subpœna issue herein, directed to the above named defendants, commanding them on a day certain to appear and answer this complaint.

Davies, Auerbach & Cornell, Attorneys for Complainant, 31 Nassau Street, New York City.

Sworn to by Samuel W. Lambert. Jurat. Omitted in printing.

[fol. 12] EXHIBIT A TO BILL OF COMPLAINT

At a meeting of the Association for the Protection of Constitutional Rights, after full discussion and deliberation, the following Resolution was adopted:

Whereas, The Eighteenth Amendment to the Constitution of the United States provides only that

"After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited";

and

Whereas, in such Amendment there is no restriction, directly or indirectly of the right of physicians to issue prescriptions for alcoholic liquor; and

Whereas, Section 7 of Title II of the National Prohibition Act, purporting only to carry said Amendment into effect, provides as follows:

Sec. 7. No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination [fol. 13] is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word 'cancelled,' together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided;"

and

Whereas, subdivision (a) of Section 77 of Article XIII of the Regulations of said Act, in assumed furtherance of said Act, provides as follows:

"(a) No prescription may be issued for a greater quantity of intoxicating liquor than is necessary for use as a medicine by the person for whom prescribed, and in no case may spirituous liquor in excess of 1 pint within any period of 10 days be prescribed for the same person by one or more physicians. Further, where spirituous liquor is being administered to any person by any physician or physicians as provided in section 71, the aggregate quantity so administered and the quantity prescribed for any such person may not exceed 1 pint within any period of 10 days;"

[fol. 14] and

Whereas, Section 71 of the said Regulations provide that

"Physicians may obtain not more than 6 quarts of liquor during any calendar year to be administered to their patients only in the quantities necessary to afford relief at the time of administering;"

and

Whereas, the purport of such Section 7 of Title II of said Act is repeated in Section 2 of An Act entitled "An Act Supplemental to the National Prohibition Act;" and

Whereas, this Association is advised that the alleged justification for such provisions of the Act and Regulation is, that failure so to restrict the right of physicians to prescribe alcoholic liquor as a medicine would, necessarily operate to defeat the enforcement of the Volstead Act; and

Whereas, such a view is not only unjustified but is a wholly unwarranted reflection upon the good faith of the Medicial Profession of America as a whole; and

Whereas, the right to practice medicine is a Constitutional right; and, in the opinion of a vast number of physicians the administration of alcoholic liquor is essential for patients in extremis, for prolongation of life and for promoting recovery during convalescence, and that such administration is prevented by such Act and Regulation;

Now, therefore, be it

Resolved, that it is the sense of this Association that the constitutionality of such provision of the Act and the validity of such [fol. 15] Regulation be forthwith submitted to the courts; and that this Association requests its president, Dr. Samuel W. Lambert, under advice of counsel, to institute litigation to this end, in the interest of the public health and the preservation and prolongation of life, and for the vindication of the rights and honor of the profession; and it is

Further resolved, that the members of this Association, however, favor and will advocate the enactment of such Regulations as will require physicians prescribing alcoholic liquor in such amounts as they deem proper, to file any and all prescriptions with properly designated Governmental authorities, in order that any abuse by unworthy practitioners of the right to administer alcoholic liquor may be prevented and the offenders adequately and summarily punished.

Brewer, George E.
Brooks, Harlow
Biggs, Hermann M.
Brown, Samuel A.
Brill, Nathan E.
Bacon, Gorham
Cussler, Edward
Caldwell, William E.
Carr, Walter Lester
Carter, Herbert S.
Coakley, Cornelius G.
Carlisle, Robert J.
Coleman, Warren
Chace, Arthur E.
Cahill, Geo. F.
Creevey, Geo. M.
Clemens, James B.
[fol. 16] Darach, Wm.
Downes, William A.
Draper, Wm. Kinnicutt
Duel, Arthur B.
Dana, Charles L.
Davis, Asa B.
Delatour, Beeckman J.
Dunning, Henry S.
Draper, George
Einhorn, Max
Edgar, J. Clifton
Erdmann, John F.
Ewing, James
Farrell, Benjamin P.
Fisher, Edward D.
Flint, Austin
Fordyce, John A.
Foord, Andrew G.
Gibson, Charles L.
Gregory, Menas S.
Gorton, James T.
Goodrich, Malcolm
Hurd, Lee Maidment
Halsey, Robert H.
Hartwell, John A.
Hess, Alfred F.
Holden, Frederick C.
Haynes, Royal S.
Holland, Arthur L.

Hitzrot, James Morley
Hunt, J. Ramsey
Hammond, Graeme M.
Hooker, Ransom S.
Chetwood, Charles H.
Hoag, Arthur F.
James, Henry
Kast, Ludwig
Keyes, Edward L., Jr.
Lusk, William C.
Lyle, Wm. G.
Lambert, Alexander
Lambert, Samuel W.
Longcope, Warfield T.
Libman, Emanuel
Lambert, Adrian Van Sinderen
McCarthy, Joseph F.
McKernon, James F.
McSweeney, Edward S.
Manges, Morris
Norton, Nathaniel R.
Northrup, William P.
Norrie, Van Horne
Nammack, Charles E.
Niles, Walter L.
Oppenheimer, B. S.
Oastler, Frank R.
Pedersen, James
Painter, H. McM.
Patterson, Henry S.
Pulley, William J.
Reese, Robert G.
Russell, James I.
Roberts, Dudley
Shelby, E. P.
Sondern, Frederic E.
Smith, Harmon
Squier, J. Bentley
Studdiford, William E.
Steward, George D.
Smith, Thomas A.
Sayre, Reginald H.
Saunders, T. Laurance
Sacks, Bernard
Taylor, Howard C.
Tilney, Frederick
Tyson, H. H.
Taylor, Fielding L.
Vaughan, Harold S.
Wightman, Orrin S.
Wallace, George B.
Wadhams, Samuel M.
Wilcox, Herbert B.
Wheelwright, Joseph S.
Whipple, Allen O.
Winter, Henry Lyle
Zinsser, Hans
Zabriskie, Edwin G.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED ANSWER—Filed Jan. 17, 1923

Now come the defendants herein and for their amended answer to the bill of complaint by their attorney William Hayward, United States Attorney for the Southern District of New York, allege as follows:

First. Defendants move that the bill of complaint herein and divers parts thereof be dismissed and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.

2. The court has no jurisdiction to grant the relief prayed for or any part thereof.

[fol. 18] 3. The court has no jurisdiction of the action forasmuch as it appears on the face of the bill that the matter in controversy does not exceed $3,000 exclusive of interest and costs.

4. The bill does not present a cause of action in equity under the Constitution of the United States.

5. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

6. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

7. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

Second. Defendants deny each of the allegations contained in Paragraph Third of the complaint.

Third. In answer to the allegations of Paragraph Sixth of the bill of complaint defendants deny that it is an essential part of complainant's right as a physician or of his duty toward his patients to prescribe any medicines or medical treatment which it is contrary to law to prescribe even though such medicines and medical treatment are in his opinion best calculated to effect a cure and establish the health of the patients.

Fourth. In answer to the allegations of Paragraph Eighth of the complaint the defendants allege on information and belief that it is the belief and judgment of large numbers of reputable and respon-[fol. 19] sible physicians throughout the United States which belief and judgment is buttressed by the writings of standard authorities on medical science that the use of spirituous liquors is never necessary for the proper treatment of patients in order to afford relief from ailments.

Fifth. In answer to the allegations in Paragraph Ninth, defendants allege on information and belief, that large numbers of eminent, reputable physicians deny that spirituous intoxicating liquors have any value as a medicine. Defendants further allege on information and belief that the prescription of more than one pint of such liquor in ten days for any complaint is not considered necessary by any large number of reputable physicians in the United States.

Sixth. Defendants deny the allegations contained in Paragraph Twelfth of the complaint.

Seventh. Defendants deny the allegations in Paragraph Thirteenth of the complaint.

Eighth. In answer to Paragraph Fourteenth of the complaint, defendants allege that they have made no threats against the complainant although they admit that if the complainant has or shall violate a law and knowledge of it is revealed to defendants he will be duly prosecuted as would any other person. Defendants are in-

formed and verily believe that the complainant has since October 28, 1919, pursued the practice of the profession of a physician profitably and successfully while the National Prohibition Act has been in effect, and defendants deny that there is any likelihood that the com- [fol. 20] plainant will suffer damage by continuing such practice of medicine.

Ninth. Defendants have no knowledge or information sufficient to form a belief as to the allegations of Paragraph Fifteenth. Defendants further allege that the allegations in said Paragraph Fifteenth of the complaint, as well as Exhibit A attached thereto, are irrelevant and impertinent to any issues purported to be raised by the bill of complaint herein.

Wherefore, the defendants pray that the bill of complaint herein be dismissed and the defendants have such other and further relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

William Hayward, United States Attorney for the Southern District of New York, Attorney for Defendants.

Office and Post Office Address: U. S. Courts and P. O. Building, Borough of Manhattan, City of New York.

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS—Filed May 9, 23

SIRS: Please take notice that the undersigned will move this Court at a term thereof to be held in Room 237 United States Courts and Post Office Building, Borough of Manhattan, City of New York, on January 19, 1923, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the complaint on the several grounds set out in Paragraph First of the amended answer herein, for judgment on the pleadings, and for such other and further relief as to the Court may seem just.

Dated New York, N. Y., January 17, 1923.

Yours, etc., William Hayward, United States Attorney for the Southern District of New York, Attorney for Defendants.

Office and Post Office Address: U. S. Courts and Post Office Building, Borough of Manhattan, City of New York.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed May 9, 1923

Davis, Auerbach & Cornell, Attorneys for Complainant (Joseph S. Auerbach and Martin A. Schenck, of Counsel).

William Hayward, United States Attorney, for Defendants (John Holley Clark, Jr., Assistant United States Attorney, of Counsel).

KNOX, D. J.:

Complainant, a duly licensed physician under the laws of this State, is here engaged in active practice. He alleges it to be an essential part of his professional right and duty towards his patients to treat their diseases and promote their physical well-being according to his best skill and judgment, and, to that end, to advise the use of such medicine and medical treatment as in his opinion are best [fol. 23] calculated to effect their cure and establish their health.

Based upon his experience, observation and study of medical science, complainant believes that the use as medicine of spirituous liquors, to be taken internally, is, in certain cases, necessary for the proper treatment of patients in order to afford relief from known ailments. Such spirituous liquors contain more than one-half of one per cent of alcohol by volume and include brandy, whiskey and wine.

Plaintiff now has under observation and subject to his professional advice certain patients whose ailments require that they should, for proper relief, use internally more than one pint of spirituous liquor in ten days, and that in certain cases it is necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding, that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant, conceiving it to be his duty so to do, intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment.

Complainant has not prescribed, and does not intend to prescribe, the use of liquor for beverage purposes, nor does he intend to prescribe the use of liquor as medicine unless, after careful physical examination, he in good faith believes that the use of liquor as medicine is necessary for the patient and will afford him relief from some known ailment.

In practising his profession, as above outlined, Dr. Lambert finds himself confronted with certain provisions of the National Prohibition Act and its amendment, as follows:

[fol. 24] Section 7 of Title II of the Act of which reads:

"No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe

liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford him relief from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days."

Similar provision relating to vinous and spirituous liquor is contained in the Act of November 23, 1921, entitled, "An Act Supplemental to the National Prohibition Act."

Both the original Act and its supplement make a violation of any of their provisions a crime, subjecting the offender to fine or imprisonment or both.

The bill goes on to allege that neither of the enactments purports to regulate the use for beverage purposes of spirituous liquors lawfully possessed, nor do they prohibit the giving of advice by any person in respect to such use or the quantities to be used. Neither do they purport to regulate the use of lawfully possessed spirituous liquors for medicinal purposes otherwise than under physicians' prescriptions nor to regulate the giving of advice in regard to such use, except in the case of physicians' prescriptions.

It is claimed that the limitations thus attempted to be imposed upon physicians are beyond the authority conferred upon Congress by [fol. 25] the Eighteenth Amendment to the Constitution, and are void and of no effect.

All this is followed by an allegation that defendants have claimed and publicly stated that they will prevent, and have threatened by legal proceedings charging complainant with crime and attempting to subject him to fine and imprisonment, to prevent him from prescribing for use as medicine to be taken internally by any patient within any period of ten days, more than one pint of spirituous liquor, even though in his best judgment and after careful physical examination of the patient, such use is necessary to afford relief from some known ailment. Such proceedings, it is said, would seriously interfere with complainant's ability to practice his profession, and would subject him to irreparable damage for which there is no adequate legal remedy. The matters complained of are asserted to be of common concern to many patients and many physicians, a number of whom have formed an organization called, The Association for the Protection of Constitutional Rights, and by resolution, have declared in favor of this suit.

In consideration of the foregoing, the Court is asked to declare unconstitutional so much of the aforementioned acts of Congress as to which complaint is made.

The answer sets up that the matter here in controversy does not exceed in value the sum of $3,000, exclusive of interest and costs, and denies that there is any duty upon a physician to prescribe medicine contrary to law; alleges that a large number of physicians deny the therapeutic value of spirituous liquors, and that prescriptions of

more than one pint of such liquors within ten days in any case is [fol. 26] not considered necessary by a large number of reputable physicians.

In view of the motion to dismiss, which admits the well pleaded allegations of the complaint, the answer upon the issuable facts need not be considered.

Whether or not the use of liquor in the treatment of certain known ailments is a valuable therapeutic agent is a controversial subject with which the Court is not, at present, particularly concerned. That the subject is highly controversial is indicated by the results of a questionnaire directed to upwards of 30,000 physicians. Of this number, 51 per cent. declare whiskey to be necessary in the treatment of certain diseases, and 49 per cent. take a contrary view.

For the purposes of this motion, it is sufficient to accept the allegations of the complaint, and to consider that Congress itself, in the very legislation under attack, has recognized that in certain cases liquor has a legitimate medicinal use, and has specified the circumstances under which it may be prescribed in given instances. The difficulty is that having done so, Congress, without reference to the quantity of liquor actually required for the proper treatment of a particular ailment from which a patient may be suffering and irrespective of the good faith, judgment and skill of the physician in attendance, proceeds to limit the amount to be prescribed to not more than a pint within a period of ten days.

In passing upon the propriety of such limitation, it is necessary to bear in mind the grant of power under which the National Prohibition Law and its amendments, were enacted; and also to inquire whether considering the end in view the statute passes the bounds of [fol. 27] reason and assumes the character of a merely arbitrary fiat. Purity Extract Co. vs. Lynch, 226 U. S., 192; Ruppert vs. Caffey, 251 U. S., 264.

The eighteenth amendment to the Constitution was designed to bring about the prohibition of intoxicating liquor "for beverage purposes" and was not, I think, intended to put an end to the use of liquor for purposes regarded by those who proposed the amendment, and by many of the States that ratified it, as justifiable and proper. This view was, in part at least, entertained by Congress in enacting the Volstead Law which permits the sale and use of sacramental wines; the use, in bona fide hospitals or sanitariums of such quantity of liquor, as may properly be administered under the direction of a duly qualified physician employed therein, to a person suffering from alcoholism; and the use of industrial alcohol under certain restrictions in arts and sciences. So far as the sacramental use of wine is concerned, there is no specific limitation of the quantity that may be purchased and consumed. Instead of manifesting the same solicitude for the physical well-being of a person suffering from a disease (other than alcoholism), the proper treatment of which demands more than a pint of liquor within ten days, that it evinced for the spiritual comfort and welfare of members of certain religious sects, Congress restricted in the manner complained of, the medicinal use of intoxicating liquor.

If, as the complaint alleges, the administration to a patient of more than the statutory quantity of liquor is necessary for his relief from a certain known ailment, the inability of such patient to have his legitimate needs supplied, means that he is subjected to a prohibition [fol. 28] that certainly is not within the terms of the Eighteenth Amendment, and which easily may be imagined, might subject him to serious consequences, if not death itself. While the exercise of regulatory power in the interest of the public at large frequently brings about individual hardship, it is to be recalled that one of its chief objects is to preserve—and is not to jeopardize and destroy—the health of its citizens. For this reason, I feel that persons are not to be deprived of the use, when required, of such medicines as are proper and necessary for their relief, unless authority for such deprivation has expressly been conferred.

All of us recognize that the unregulated use of morphine, cocaine and other habit-forming drugs may have most baneful effects; but who would say, they should not, in a proper case, be prescribed by a competent physician?

Of course, the assertion can and probably will be made, that the possibilities to which I have referred, are a far call from the probability that any such result would be brought about through the absence of liquor from the treatment of any known ailment. It is, however, to be remembered that the admitted allegations of the complaint are that the use of more than a pint of liquor within ten days is necessary for the treatment of certain known ailments—the statute admits that the use of liquor may sometimes be necessary—and "necessary," while it may mean something less than indispensable, at least, includes that which is desirable, advisable and needful.

If this be true, it would seem not to be a function of the Congress—particularly, under the amendment, to invade, as it were, the domain of medical authority, and to deprive patients of that which they need, and, by every principle of right and justice, are entitled [fol. 29] to have. Having assumed so to do, it would appear that the action does not constitute legislation appropriate to the object sought to be attained through the adoption of the amendment. To me it seems reasonably clear that the right of the public to have available for its use, when required in the proper treatment of disease, an adequate supply of a valuable therapeutic agent, transcends the present power of Congress to decree otherwise upon the basis of expediency or policy. Under the facts presented by the complaint, the danger that persons bent upon a violation of the Volstead Law may, through the medicinal use of liquor, be furnished with a means of procuring intoxicants for beverage purposes, is to be overcome through regulations. These may be of the most stringent character, but they must, in my opinion, fall short of an actual prohibition against the use of liquor to the extent demanded by the reasonable necessities of the proper treatment of known ailments.

So far as I am informed, the legislation complained of does not purport to be based upon any finding as to the quantity of liquor that reasonably and properly may be required within a specified period for the treatment of disease. If otherwise, I should be inclined to

dismiss the bill, it being my impression that within reasonable limits the quantity to be prescribed may be regulated by Congress. But, accepting the complaint as made, the limitation now imposed seems to be arbitrary and without justification. Should the proof show the contrary to be the fact, the complainant of course cannot prevail.

As bearing upon what was sought to be accomplished through the instrumentality of the Eighteenth Amendment, I quote from the [fol. 30] Report of the Senate Judiciary Committee, dated June 11, 1917, in which the adoption of a concurrent resolution submitting amendment to the States was recommended. The Committee in settting forth some of the arguments advanced by proponents of the measure reported the following:

"National law, enacted under an amended Constitution, could prohibit transportation and sale, and in concurrence with like legislation by the States (the union of the power of the nation and the power of the statutes), thus securing the entire strength of the whole community, could soon put an end to the traffic. Under such restriction in a generation or two the consumption of alcohol as a beverage would practically disappear. Alcohol would still be manufactured, distributed and sold under the restrictions appertaining to other poisons; and in *use as a medicine* (italics mine), and in the arts would not be interfered with. Its manufacture and distribution would be controlled by like regulations as those made with reference to dynamite, nitroglycerine and gunpowder, and the whole family of poisons, and in fact, all articles of great and dangerous potency which, nevertheless, have their legitimate uses for the benefit of mankind."

I have little or no doubt that it was the impelling force and reasonableness of the thought expressed by the foregoing quotation that brought about the submission of the amendment to the several States, and was responsible for its ratification by forty-five of them.

[fol. 31] Again, it is interesting in this connection to glance at the prohibition laws of some of the States and to see how they regard the medicinal use of liquor or of alcohol.

In Kentucky, the Supreme Court, speaking in the case of Sarls vs. Commonwealth, 83 Ky., 427, said:

"* * * while the Legislature has the power to regulate the sale of liquor to be used as a beverage, or to prohibit its sale for that purpose altogether, it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as a medicine";

and again

"* * * the power of the Legislature to prohibit the prescription and sale of liquors to be used as medicines does not exist, and its exercise would be as purely arbitrary as the prohibition of its use and sale for religious purposes."

Missouri ratified the amendment upon January 16, 1919, and in the enforcement of the law, which took effect upon the date that the

amendment became operative, permitted the prescriptions by physicians of either alcohol or wine for medicinal purposes. The amount to be thus prescribed was not arbitrarily fixed. As late as March 28, 1921, the Legislature of that State amended the law so as to permit the prescription of intoxicating liquor other than that specified in the Act of January 16, 1918.

The State of Nevada, in a prohibition statute, enacted pursuant to a vote of her people, upon November 5, 1919, gave permission to [fol. 32] physicians to prescribe pure grain alcohol for medicinal purposes, and imposed no arbitrary limitation upon the quantity that might be used.

A somewhat similar statute is in force in New Mexico.

The Constitution of Michigan, Section 11, Article 16, makes provision for the prohibition of liquor traffic, except for medicinal, mechanical, chemical, scientific or sacramental purposes, and directs that legislation provide for regulations upon the sale of intoxicants. I find no artificial limitation upon the quantity that physicians may prescribe for medicinal use. For a construction of the State statute, see People vs. Ureavitch, 210 Mich., 431.

For years a law of Indiana made unlawful the retailing of spirituous liquor without license, and contained no exception in favor of a sale for medicinal purposes. By a long line of decisions it has been held that a bona fide sale for such purposes was not within the statute. See Donnell vs. State, 2 Ind., 608; State vs. Sholts, 15 Id., 119; Dixon vs. State, 76 Fed., 526. The present law, I am informed, provides only that it shall be unlawful for any licensed physician to issue a prescription for intoxicating liquor except in writing, or in any case, unless he has good reason to believe that the person for whom it is issued will use the same for medicinal or surgical purposes or as an antiseptic.

Alabama prohibits the sale of intoxicants for medical purposes save upon prescription of a regularly authorized physician.

In Florida, alcohol may be prescribed and used for medicinal purposes and so in Mississippi, South Carolina, Georgia, Arkansas, Delaware, Oklahoma, Oregon, Tennessee and Texas. In North Carolina, [fol. 33] grain alcohol may be sold for medicinal purposes, and it may be prescribed under certain conditions in Washington. In South Dakota, spirituous and vinous liquors may be prescribed. The statute of Kansas excepts from its operations the medicinal use of intoxicating liquors. Colorado and Minnesota regulate the quantity of liquor that may be prescribed upon one perscription, but they do not declare the amount that a patient shall use within a specified time.

Utah prohibits the prescription of any compound containing more than one-half of one per cent. of alcohol by volume and which is capable of being used as a beverage, and it is possible that a few other states have laws as drastic. I think, however, that it is fair to say that as a whole the ratifying states did not mean to dispense with the adequate use in a given case of such amount of specified intoxicants as were believed to possess therapeutic value.

It is, however, argued that, irrespective of all that has been said, the cases of Purity Extract Co. vs. Lynch and Ruppert vs. Caffey, supra, makes it necessary to dismiss the complaint. I freely admit those decisions give me pause. Nevertheless, it is to be remembered that the results in those cases were in no small measure based upon the legislative and judicial history of many of the States in dealing with local prohibition statutes. Under such a course of reasoning, I feel that much support is to be found for complainant's contention in the preceding summary of legislation within the States where prohibition has been recognized for many years, to be a proper and desirable policy. The regard which they manifested for the preservation of the right of the public to resort to the medicinal use of [fol. 34] intoxicating liquors in the treatment of known ailments, is not without influence in placing a construction upon legislation enacted pursuant to the limited authority of the Eighteenth Amendment.

From the foregoing, I have reached the conclusion that the limitations of the Volstead Act, and its amendments, which make it lawful to prescribe but one pint of intoxicating liquor for the internal and medicinal use of a person whose known ailment, if it is properly to be treated, requires the administration of a greater quantity, are void. An injunction pendente lite may issue against the defendant.

May 8, 1923.

John C. Knox, U. S. D. J.

[fol. 35] In United States District Court

[Title omitted]

Judgment and Order Granting Injunction—Filed May 31, 1923

This cause duly came on to be heard before this Court and motion having been made by complainant for temporary injunction pendente lite and motion having been made by defendants to dismiss the complaint, and due consideration having been had, it was

Ordered, adjudged and decreed that the motion of the defendants [fol. 36] to dismiss the complaint herein be, and the same hereby is denied and it is

Further ordered, adjudged and decreed that the defendants, and each of them be and they hereby are restrained and enjoined during the pendency of this action from enforcing or attempting to enforce against the complainant the provisions of Section 7, of Title II of the National Prohibition Act in so far as the said section prescribes that not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and it is

Further ordered that the operation of the injunction hereinabove set forth, be and the same hereby is stayed pending the determination

of an appeal to be taken from this decree by the defendants within the time prescribed by law.

Jno. C. Knox, U. S. D. J.

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS.—Filed June 13, 1923

Come now the defendants and file the following assignment of errors upon which they will rely upon their appeal from the interlocutory decree made by this Honorable Court on the 29th day of May, 1923, in the above entitled cause.

First. That the Court erred in denying the motion of the defendants to dismiss the complaint herein.

Second. That the Court erred in granting complainant's motion for an injunction pendente lite and in restraining and enjoining the defendants during the pendency of this action from interfering with the complainant in his acts as a physician in prescribing vinous or spirituous liquors to his patients for medicinal purposes [fol. 38] upon the ground that the quantities prescribed for the use of any one person in any period of ten days exceed the limits fixed by the Volstead Act and its amendments.

Third. The Court erred in not denying motion for an injunction pendente lite as prayed for in the bill of complaint.

Fourth. The Court erred in failing to hold that the suit herein was in fact one against the United States and that the complaint did not aver or show that the United States had consented to be sued therein.

Fifth. The Court erred in failing to hold that it was without jurisdiction to grant the relief prayed for or any part thereof.

Sixth. The Court erred in failing to hold that it had no jurisdiction of the action for as much as it appeared on the face of the bill that the matter in controversy did not exceed $3,000 exclusive of interest and costs.

Seventh. The Court erred in failing to hold that the bill of complaint did not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

Eighth. The Court erred in failing to hold that it appeared from the bill of complaint that the complainant had a plain, adequate and complete remedy at law.

Ninth. The Court erred in holding that the action of Congress in limiting the amount of liquor which might be prescribed to one per-

[fol. 39] son to one pint within a period of ten days, "does not constitute legislation appropriate to the object sought to be obtained to the adoption of the 18th amendment."

Tenth. The Court erred in holding that the limitations of the Volstead Act and its amendments, which make it lawful to prescribe but one pint of intoxicating liquor for the internal and medicinal use of a person whose known ailment if it is properly to be treated, requires the administration of the greater quantity, are void.

Wherefore, appellants-defendants pray that the decree of the said Court may be reversed and in order that the foregoing assignments of error may be a part of the record the appellants-defendants present the same to the Court and prays that such disposition may be made thereof as is in accordance with law and the statutes of the United States in such matter made and provided.

All of which is respectfully submitted.

Dated New York, June 12, 1923.

William Hayward, United States Attorney for the Southern District of New York, Attorney for Defendants.

[fol. 40] CITATION—in usual form; Filed June 19, 1923; omitted in printing

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[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated October 5th, 1923.

Davies, Auerbach & Cornell, Attorneys for Complainant.
Wm. Hayward, Attorney for Defendants.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do

hereby certify that the foregoing is a correct transcript of the Record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to hereunto affixed, at the City of New York, in the Southern District of New York, this 9th day of October, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk.

[fol. 43] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD C. YELLOWLEY, as Acting Prohibition Director; David H. Blair, as Commissioner of Internal Revenue, and William Hayward, as United States Attorney, Appellants (Defendants Below),

against

SAMUEL W. LAMBERT, Appellee (Complainant Below)

Before Rogers and Hough, Circuit Judges, and Learned Hand, District Judge

William Hayward, U. S. Attorney, for appellants; John Holley Clark, Jr., of Counsel; Davies, Auerbach & Cornell, for appellee; Joseph S. Auerbach, Martin A. Schenck, Emily C. Holt, of Counsel.

OPINION

This cause comes here from the United States District Court for the Southern District of New York.

The facts are stated in the opinion.

Rogers, Circuit Judge. The complainant is a physician engaged in the practice of medicine in the City of New York. It is conceded that he is a man of great distinction in his profession and of wide and ususual experience in the practice of medicine. He filed a bill of complaint in the court below in which he asked that provisions [fol. 44] in the National Prohibition Act, commonly known as the Volstead Act, being the Act of October 28, 1919, 41 St. 305, c. 85) as well as of the Act Supplemental to the National Prohibition Act, being the Act of November 23, 1921, c. 134, also known as the Willis-Campbell Act, should be declared unconstitutional and that an injunction be issued restraining the defendants from interfering with the complainant in his acts as a physician in prescribing vinous or spirituous liquors to his patients for medicinal purposes upon the ground that the quantities prescribed for the use of any one person

in any period of ten days exceeded the limits fixed by the said Acts, or either of them.

The bill contained the following allegations:

"Sixth. It is an essential part of complainant's right as a physician and of his duty toward his patients to treat their diseases and promote their physical well-being according to the untrammeled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such medicines and medical treatment as in his opinion are best calculated to effect their cure and establish their health. By practicing medicine the complainant is authorized to and does hold himself out to the world as willing to place at the service of patients such skill and judgment as are above described, to the full extent of his ability.

Seventh. According to the usage and practice of the medical profession, long established and generally accepted, physicians, in advising the use of drugs and medicines, do so by written statements containing explicit directions as to the time and manner of administration and as to the quantities to be used. Such written statements and directions are called prescriptions. In issuing a prescription the physician assumes no responsibility and exercises no control in respect to procuring the drugs or medicines prescribed, but merely expresses his judgment as to what the needs of the patient require for the restoration of health.

Eighth. It is the belief and judgment of the complainant based upon his experience and observation and the study of medical science, that the use as medicine of spirituous liquor to be taken internally is, [fol. 45] in certain cases, necessary for the proper treatment of patients in order to afford relief from known ailments. By spirituous liquors, complainant means liquors containing more than one-half of one per cent of alcohol by volume, including brandy, whiskey and wine.

Ninth. In prescribing drugs and medicine, the determination of the quantity to be used involves a consideration of the physical condition of the patient, and of the probable effect thereon of such drugs and medicines in each specific case. It is the belief of the complainant, based upon his experience and observation and the study of medical science, that in the use of spirituous liquors as medicine it is in certain cases, including cases now under complainant's observation and subject to his professional advice, necessary, in order to afford relief from some known ailment, that the patient should use internally more than one pint of such liquor in ten days and that it is in certain cases necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant conceives it to be his duty and intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment.

Tenth. Complainant has never prescribed and does not intend to prescribe the use of liquor for beverage purposes. Complainant does not intend to advise or prescribe the use of liquor as medicine unless, after careful physical examination of the patient, he in good faith believes that the use of such liquor as medicine by the patient is necessary and will afford relief to him from some known ailment.

* * * * * * *

Thirteenth. Complainant is advised and respectfully represents to the court as matter of law, that so much of the National Prohibition Act as purports to prohibit physicians from advising or prescribing the use, internally, for medicinal purposes by any person of more than one pint of spirituous liquor within any period of ten days, and so much of the said Act entitled 'An Act supplemental to the National Prohibition Act' as purports to limit the quantity of vinous or spirituous liquor that may be advised or prescribed by a physician for use, internally, for medicinal purposes by any person within the same period, are and each of them is beyond the authority conferred upon Congress by the Eighteenth Amendment to the Constitution of the United States, or otherwise, and are void and of no effect."

The court below refused to dismiss the bill and granted an injunc-[fol. 46] tion—the material portion of which can be found in the margin.[1]

That portion of the National Prohibition Act complained of is found in Title II Section 7. It reads as follows:

"No one but a physician holding a permit to prescribe liquor shall issue any prescriptions for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word 'canceled,' together with the date

[1] "Further ordered, adjudged and decreed that the defendants, and each of them be and they hereby are restrained and enjoined during the pendency of this action from enforcing or attempting to enforce against the complainant the provisions of Section 7, of Title II of the National Prohibition Act in so far as the said section prescribes that not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and it is

Further ordered that the operation of the injunction hereinabove set forth, be and the same hereby is stayed pending the determination of an appeal to be taken from this decree by the defendants within the time prescribed by law."

when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose."

And that portion of the Act supplemental to the National Prohibition Act, which is complained of, is found in Section 2—the [fol. 47] material portion of which reads as follows:

"That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void. No physician shall prescribe, nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall anyone prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall any physician issue more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinary reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him. But this provision shall not be construed to limit the sale of any article the manufacture of which is authorized under section 4, Title II, of thhe National Prohibition Act."

Before proceeding to a consideration of the legislation herein attacked it is necessary to consider a preliminary question which has been raised.

The objection has been made that the court below was without jurisdiction as the complaint did not show that the amount in controversy exceeded the sum of $3,000 exclusive of interest and costs. The complaint alleged that the suit was one of a civil nature and the amount in controversy was in excess of $3,000. And as the defendants below moved to dismiss the complaint they thereby admitted the facts alleged in the complaint so that they are in no position to raise the question of jurisdiction. Street v. Lincoln Safe Deposit Co. 254 U. S. 88. We may nevertheless point out that where an injunction is sought to prevent interference with the plaintiff's business, the amount in controversy is the value of the business to [fol. 48] be protected and of the rights of property which it is sought to have recognized and enforced. It is not merely the damages which have accrued prior to the commencement of the action which the court regards, but it looks to the effect upon the plaintiff's business through the entire period within which the damages is threatened. Bitterman v. Louisville & Nashville Railroad, 207 U. S. 205, 225.

We come now to the consideration of the real question in this case which is the validity of the Prohibition Acts as they affect the right of a medical practitioner to prescribe spirituous or vinous liquors in the treatment of disease. And in the decision of this question we are governed by the fundamental rule which controls the courts whenever they are called upon to determine any constitutional question relating to the validity of an Act of legislation.

The courts of the United States from the beginning in an unbroken line of decisions have acted on the principle that every possible presumption is in favor of the constitutionality of an Act of Congress until it is overcome beyond all rational doubt. That principle was again stated in the recent case of Adkins v. Children's Hospital 261 U. S. 525, 544. The judicial duty of passing upon the constitutionality of the Acts of Congress herein involved being one of "great gravity and delicacy," this court must decide this case in favor of the validity of the Statutes unless it appears by clear and indubitable demonstration that Congress has exceeded its constitutional power in their enactment. The powers of Congress embrace those expressly granted by the Constitution and such as may be [fol. 49] implied from those so granted.

Whatever power Congress has to prohibit the use of intoxicating liquors as a beverage it derives from the Eighteenth Amendment to the Constitution. The material part of that amendment reads as follows:

"After one year from the ratification of this Article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

And the Amendment gives to Congress and the several States concurrent power to enforce it by appropriate legislation.

That amendment, as Mr. Justice Holmes, speaking for the court in Grogan v. Walker & Sons, 259 U. S. 80, 89, said "meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the Statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. * * * It is obvious that those whose wishes and opinions were embodied in the Amendment meant to stop the whole business." There can be no doubt as to what Congress intended. It intended to put an end in this country to the use of malt and spirituous liquors for beverage purposes. And to that end it prohibited the manufacture, possession, sale, importation into and exportation from the United States, as well as transportation within the United States of liquor for beverage purposes.

The Amendment was incorporated into the Constitution because it was believed that the use for beverage purposes of intoxicating [fol. 50] liquors was pernicious in its effects and the cause of disease, pauperism and crime, and that the nation should protect itself

against the injurious consequences arising from the use of such liquors. It was thought that by this Amendment the public health, the public morals, and the public safety would be promoted by suppressing the evils connected with the excessive use of intoxicants.

The constitutionality of the State prohibition laws, when they came before the Supreme Court, had been uniformly upheld. As early as 1847, in the License Cases 5 How. 504, 577, Chief Justice Taney, referring to the suggestion that if a State deemed the traffic in ardent spirits to be injurious to its citizens and calculated to introduce immorality, vice and pauperism into the State it could prohibit it, said:

"And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper. Of the wisdom of this policy, it is not my province or my purpose to speak. Upon that subject, each State must decide for itself."

And see Bartemeyer v. Iowa, 18 Wall. 129; Beer Co. v. Massachusetts, 97 U. S. 25; Foster v. Kansas 112 U. S. 201, 206; Mugler v. Kansas, 123 U. S. 623; Crowley v. Christensen 137 U. S. 86, 91; Purity Extract & Tonic Co. v. Lynch 226 U. S. 192, 201; Clark Distilling Company v. Western Maryland Railway Company 242 U. S. 311, 320; Seaboard Air Line R. Co. v. North Carolina 245 U. S. 298, 299; Crane v. Campbell, 245 U. S. 304. In the case last cited the court said:

"It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has [fol. 51] power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. * * *

As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective."

The Acts passed by Congress under the authority conferred by the Eighteenth Amendment as well as the validity of the Amendment itself have been vigorously challenged by their opponents.

The complaints about the law have been many. Its opponents have challenged the constitutionality of the Amendment and of the Acts of Congress enacted under it and intended to make it effective but thus far to little or no purpose. In the case now before the court a new question is raised.

The constitutionality of the Eighteenth Amendment came before the Supreme Court in National Prohibition Cases 253 U. S. 350. The court held the Amendment was lawfully submitted by Congress to the States, was lawfully ratified by the States, and has be-

come a part of the Constitution and must be respected and given effect the same as the other provisions of that instrument.

In Jacob Ruppert v. Caffey 251 U. S. 264 the Supreme Court held that the provision in the National Prohibition Act which declares that the words "beer, wine, or other intoxicating malt or vinous liquors" shall be construed to mean any such beverages which contain one-half of one per centum or more of alcohol by volume, is constitutional. The decision went upon the theory that a measure reasonably necessary to make the prohibition of intoxicating liquors [fol. 52] effectual was within the power of Congress to enact even though it prohibited the use of liquor containing one-half of one per centum or more of alcohol, and such liquor was not in fact intoxicating.

In Everard's Breweries v. Day, 265 U. S. 545, the Supreme Court had before it Section 2 of the Act of November 23, 1921, in so far as it prohibits physicians from prescribing intoxicating malt liquors for medicinal purposes. That Act provides that "only spirituous and vinous liquor may be prescribed for medicinal purposes," and that all prescriptions for any other liquor and permits therefor shall be void. The contention was that the Act was unconstitutional as the prohibition of prescriptions for the use of intoxicating liquors was neither an appropriate nor reasonable exercise of the power conferred upon Congress by the Eighteenth Amendment, and also that it infringed upon the legislative power of the States in matters affecting the public health. The court over-ruled the objections and sustained the constitutionality of the Act. Mr. Justice Sanford, writing for the Court, said:

"The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. Art. I, sec. 8, cl. 18. In the exercise of such non-enumerated or 'implied' powers it has long been settled that Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. (Citing cases.) Furthermore, aside from this fundamental rule the Eighteenth Amendent specifically confers upon Congress the power to enforce 'by appropriate legislation' the constitutional prohibition of the traffic in intoxicat- [fol. 53] ing liquors for beverage purposes. This enables Congress to enforce the prohibition 'by appropriate means.' National Prohibition Cases, 253 U. S. 387.

It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon Legislative ground. Nor may it enquire as to the wisdom of the legislation. What it may consider is whether that which has been done by Congress has gone beyond the constitutional limits upon its legislative discretion.

It is clear that Congress, under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes, may adopt any eligible and appropriate means to make that prohibition effective. The possible abuse of a power is not an argument against its existence. And it has been held that the power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although non-intoxicating.

The ultimate and controlling question then is, whether in prohibiting physicians from prescribing intoxicating malt liquors for medicinal purposes as a means of enforcing the prohibition of traffic in such liquors for beverage purposes, Congress has exceeded the constitutional limits upon its legislative discretion.

In enacting this legislation Congress has affirmed its validity. That determination must be given great weight; this Court by an unbroken line of decisions having 'steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.' We cannot say that prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth Amendment and is not adapted to accomplish that end and make the constitutional prohibition effective. The difficulties always attendant upon the suppression of traffic in intoxicating liquors are notorious. The Federal Government in enforcing prohibition is confronted with difficulties similar to those encountered by the States. The opportunity to manufacture, sell and prescribe intoxicating malt liquors for 'medicinal purposes' opens many doors to clandestine traffic in them as beverages under the guise of medicine; facilitates many frauds, subterfuges and artifices; aids evasion and, thereby and to that extent, hampers and obstructs the enforcement of the Eighteenth Amendment. A provision in a revenue act which tends to diminish the opportunity for clandestine traffic [fol. 54] in avoidance of the tax, has a reasonable relation to its enforcement."

We have quoted thus fully because the reasoning upon which that decision went is exactly the reasoning upon which we decide the case now before us. The only difference between that case and this is that the former case related to the prohibition of malt liquors while this relates to spirituous or vinous liquors, and the further distinction seems to us, so far as the legal right is concerned, that in the former case Congress prohibited any prescription of malt liquors while in this case we are concerned with the fact that it limited to a specified quantity the amount of spirituous or vinous liquor that can be prescribed within a fixed period. In the former case the court declared that in prohibiting prescriptions of intoxicating malt liquors for medicinal purposes Congress had not violated any personal rights of the appellants protected by the Constitution.

During the pendency of the bill in Congress hearings were had

before the Judiciary Committee and an extract from its report is found in the margin.[1]

[fol. 55] If Congress did not exceed the constitutional limits upon its legislative discretion in prohibiting physicians from prescribing intoxicating malt liquors for medicinal purposes as a means of enforcing the prohibition of traffic in such liquors for beverage purposes, we are unable to see how it can be said that it exceeded the constitutional limits of its discretion in prohibiting physicians from prescribing for medicinal purposes "more than one-half pint of alcohol for use by any person within any period of ten days." It was urged upon the court in the first case that it was not within the power of Congress to prohibit physicians from prescribing malt intoxicating liquors for medicinal purposes, if in their judgment, such prescriptions seemed best, and according to their science and practice of medicine. There was evidence in that case not only that beer is a necessary therapeutic agent, but a leading physician's affidavit that he "had far greater occasion to prescribe beer than to prescribe spirituous or fermented liquors." It was said at the argument, and not wholly without justification, that the only fundamental distinction between the two cases was that the medical adherents of beer complained that they were entirely prohibited from prescribing this so called necessary therapeutic agent, while the medical adherents of whiskey and brandy were complaining of the restriction placed upon the amount of the spirituous or vinous liquors they were permitted to prescribe.

The Judiciary Committee in its report on the Willis Campbell Act, referring to Section 2, had this to say:

[fol. 56] "While the majority of the States prohibit wine for medicinal purposes, it was not deemed best by the committee that such provision should be inserted in the prohibition act at this time. In order, however, that this privilege should not be abused, it was deemed best to specifically limit its use, the same as has been done

---

[1] "The evidence presented to the committee to the effect that beer has never been recognized as a medicine was overwhelming. The United States Pharmacopoeia has never listed it as a medicine. One hundred and four of the leading physicians and scientists in the Nation signed the following statement: 'The undersigned physicians of the United States desire to place on record their conviction that the manufacture and sale of beer and other malt liquors for medicinal purposes should not be permitted. Malt liquors never have been listed in the United States Pharmacopoeia as official medicinal remedies. They serve no medical purpose which can not be satisfactorily met in other ways, and that without the danger of cultivating the beverage use of an alcoholic liquor.' Several thousand other physicians signed the above, or a similar statement, and presented it to the committee. The attorney for the Anheuser-Busch Co. (Inc.) appeared before the committee and called attention to the fact that if beer was permitted as a medicine it would be impossible to enforce the prohibition law. There was only one doctor who appeared before the committee in favor of beer as a medicine, and the New York County Medical Association, the official medical association of New York, denied that he spoke for them in favoring beer for medicinal purposes."

with spirituous liquor. Unless some limit is placed upon the amount of such liquors that may be prescribed a number of physicians who do not have the high ethical standards of the large majority will abuse the privilege. Evidence was presented to the committee of physicians who issued hundreds of prescriptions within a few days when the total number of other prescriptions was a negligible number. In view of the fact that most of the States have more stringent provisions than the one contained in Section 2, this legislation will work no hardship upon the profession." (House Report No. 224, 67th Congress, 1st Session.)

The fact may also be noted that whether or not whiskey, wine or beer has a therapeutic value in the treatment of disease is a very much disputed question in the medical profession. In the year 1917 the American Medical Association, which has a membership of 150,000 physicians, passed a resolution discouraging the use of alcohol as a therapeutic agent, which resolution is in the margin.[1]

It is impossible for us to say as a matter of law that the limitation placed upon physicians in prescribing liquor as a remedy for disease is not fairly adapted to the end of protecting the people of the United States against the evils which result from the use of intoxicating liquors. We are not ignorant of the manifold difficulties attendant upon an attempt to enforce the laws prohibiting the use of intoxi- [fol. 57] cating liquors, and we have no right to say that such restriction as Congress has imposed upon the right of physicians to use such liquors in the treatment of disease, is so arbitrary, or unreasonable or without such proper relation to the legitimate legislative purpose, as renders the legislation in question void and without effect.

It appears that when the Statute was passed the Congress was aware of the opposing theories held by physicians as to the therapeutic value of spirituous and vinous liquors in the treatment of disease and was compelled to determine whether physicians, in the practice of their profession, should be permitted to prescribe them at all and if so to what extent. In Jacobson v. Massachusetts 197 U. S. 11, 30, the question was whether a compulsory vaccination law of a State was void as violating the liberty secured by the Constitution of the United States to every person within its jurisdiction.

In that case attention was called to the conflicting views entertained in the medical profession as to the value of vaccination as a preventative measure for smallpox. The court, in upholding the validity of the law, said:

[1] "Whereas, We believe that the use of alcohol as a beverage is detrimental to humanity economy, and

Whereas, its use in therapeutics, as a tonic or a stimulant or as a food has no scientific basis, therefore be it resolved that the American Medical Association opposes the use of alcohol as a beverage, and be it further

Resolved, That the use of alcohol as a therapeutic agent should be discouraged."

"We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all the information it had or could obtain. It could not properly abdicate its function to guard the public [fol. 58] health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective if not the best known way in which to meet and suppress the evils of a smallpox epidemic that imperilled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all questions, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

And in like manner this court cannot say either that the Volstead or the Willis-Campbell Act unduly invades the complainant's liberty to practice his profession according to his judgment. It was for Congress and not the courts to determine whether it was necessary or advisable to permit these liquors to be prescribed at all by physicians and if to be prescribed to fix the quantity that may be prescribed at any one time or within a fixed period. And if, in the opinion of Congress, the public safety or the public morals required the prohibition of the use of intoxicants that prohibition might be absolute or qualified as Congress might determine. And we fail to discover anything in the Acts of Congress herein involved which is in violation of the constitutional guarantees of life, liberty and property. "No one may rightfully do that which the law-making power, upon reasonable grounds, declares to be prejudicial to the general welfare." Mugler v. Kansas, supra.

In Purity Extract Co. v. Lynch 226 U. S. 192, the court had before it the constitutionality of a Mississippi Statute prohibiting the [fol. 59] sale of malt liquors. Poinsetta was sold as a beverage. It contained no alcohol and was not intoxicating, and the question was whether being a malt liquor, and not alcoholic or intoxicating it was competent to prohibit its sale. The court upheld the law. In an opinion written by Justice Hughes, for a unanimous Court, he said:

"The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some

innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.

That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not, is a necessary means to the suppression of trade in intoxicants, sufficiently appears from the legislation of other States and the decision of the courts in its construction. State v. O'Connell, 99 Maine, 61; 58 Atl. Rep. 59; State v. Jenkins, 64 N. H. 375; State v. York, 74 N. H. 125, 127; State ex rel. Guilbert v. Kauffman, 68 Oh. St. 635; 67 N. E. Rep. 1062, Luther v. State (Nebraska) 20 L. R. A. (N. S.) 1146; Pennell v. State 141 Wisconsin, 35; 123 N. W. Rep. 115. We cannot say that there is no basis for this widespread conviction.

The State, within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved power."

A person has an inherent right to life and in order to maintain it a right to eat and to drink. But the right to drink liquors which are intoxicating the State or the United States may take away and in order to do so effectively the Government may take away the right to drink certain liquors containing alcohol insufficient in [fol. 60] amount to produce intoxication. That much is settled by the decisions of the courts. And for the same reason which leads the law-making power of a State or of the United States to prohibit the use of liquor containing a less amount of alcohol than is required to make it intoxicating, the law-making power may restrict the physician as to the amount of such liquor he can prescribe to his patient in a given period. We cannot say that a physician's right to prescribe alcohol in the treatment of disease is inherent and cannot be regulated or controlled by the law-making power of the State. The proposition is unsupported by authority and is unsound in principle.

It remains true that the inquiry in such a case as this is whether considering the end in view the legislation complained of, and which restricts the right of physicians to prescribe spirituous and vinous liquors in the treatment of disease, "passes the bounds of reason and assumes the character of a merely arbitrary fiat." Because we cannot say that it does the decree is hereby reversed and the District Court is directed to dismiss the bill.

[fols. 61 & 62] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the Southern District of New York

JUDGMENT—Dec. 25, 1924

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed and the District Court is Directed to dismiss the bill.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

C. M. H. M. T. M.

[fol. 63] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME

To the Honorable Henry Wade Rogers, Chief Justice of the United States Circuit Court of Appeals for the Second Circuit:

Now comes the appellee, by his solicitors, Davies, Auerbach & Cornell, and feeling himself aggrieved by the decree made and entered in this cause on the 26th day of December, 1924, reversing the order of the United States District Court, for the Southern District of New York, which granted to the appellee a preliminary injunction, and the United States Circuit Court of Appeals, for the Second Circuit, having furthermore decreed the issuance of a mandate directing the United States District Court for the Southern District Court of New York, to dismiss the bill of complaint herein, manifest error has intervened to the great damage of the petitioner, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal be allowed, and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers, upon [fol 64] which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States, at Washington, D. C.; that the jurisdiction of the Circuit Court of Appeals, for the Second Circuit, depends upon the fact that the complainant below sought an injunction, restraining the defendants-appellants from exercising any authority under the National Prohibition Act (Act of October 28, 1919, 41 St. 305, *3*. 85) and under the Act Supplemental to the

National Prohibition Act (Act of November 23, 1921, c. 134) to interfere with his acts as a physician, in prescribing vinous or spirituous liquors to his patients; that the amount involved herein and the matter in controversy exceeds the sum of One thousand dollars ($1,000), besides costs, and this is not a case in which the jurisdiction of the United States Circuit Court of Appeals is made final by statute.

Wherefore, petitioner prays for an allowance of the appeal, to the end that the cause may be carried to the Supreme Court of the United States, and petitioner prays for the issuance of a citation, and such other process as may be required to perfect the appeal prayed for, to the end that the error therein may be corrected.

Davies, Auerbach & Cornell, Solicitors for the Appellee, 34 Nassau Street, New York, N. Y.

Appeal allowed and citation directed to be issued and bond fixed [fol. 65] in the sum of One thousand dollars ($1,000) conditioned as the law directs, this 6th day of February, 1925.

Henry Wade Rogers, Judge United States Circuit Court of Appeals for the Second Circuit.

[fol. 66] In United States Circuit Court of Appeals

[Title omitted]

Assignment of Errors

Now on this 6th day of February, 1925, comes Samuel W. Lambert, appellee, by his solicitors, Davies, Auerbach & Cornell, and respectfully says that the decree entered in the above named cause on the 26th day of December, 1924, is erroneous and unjust to the appellee in the following respects:

First. The Court erred in directing that the bill of complaint be dismissed.

Second. The Court erred in refusing to hold unconstitutional so much of the National Prohibition Act, and of the Willis-Campbell Act, supplemental thereto as purports to prohibit physicians from advising or prescribing the use, internally, for medicinal purposes by any person of more than one pint of spirituous liquor within any period of ten days.

Third. The Court erred in holding that the power of Congress to prohibit medical prescriptions of spirituous liquor could be implied from any of those powers expressly granted it.

[fol. 67] Fourth. The Court erred in holding that the reasoning and the decision of the Supreme Court in the case of Everard's Breweries v. Day, 265 U. S. 545 is exactly the reasoning upon which the present case was decided and in failing to hold that the reasoning

in the Everard's Breweries case leads to the conclusion that the statute passes the bounds of reason and assumes the character of a merely legislative fiat, in respect of its prohibition of medical prescription of spirituous liquor.

Fifth. The Court erred in holding that the only difference between the two cases was that the Everard's Breweries case related to the prohibition of malt rather than of spirituous liquor and in refusing to hold that the reasonableness of the prohibition of malt liquor had been sustained on the recognition by Congress of the prescription of spirituous liquor as a matter affecting the public health.

Sixth. The Court erred in refusing to hold that Congress, after recognizing the prescription of spirituous liquor as a matter affecting public health, passed beyond the constitutional limits upon its legislative discretion in proceeding to prohibit the prescription of more than one pint in ten days, without examination into either the necessity thereof or the effect thereof upon life and health.

Seventh. The Court erred in holding that the National Prohibition Act (Act of October 28, 1919, 41 St. 305 c. 85), and the Act supplemental to the National Prohibition Act (Act of November 23, 1921, c. 134) did not place arbitrary and unreasonable prohibitions upon the right of physicians to use vinous and spirituous liquors in [fol. 68] the treatment of diseases, and in refusing to hold that Congress thus exceeded its powers to enforce the law prohibiting the use of intoxicating liquors as beverages.

Eighth. The Court erred in holding that it appears when the Statute was passed that Congress was aware of opposing theories held by physicians on the value of spirituous liquors as therapeutic agents and further erred in holding that Congress was thereby compelled to determine whether physicians in the practice of their profession should be permitted to prescribe them.

Ninth. The Court erred in holding that the National Prohibition Act and the Act supplemental thereto (supra) did not invade the complainant's liberty to practice his profession according to his judgment.

Tenth. The Court erred in holding that Congress had the power under the Eighteenth Amendment to enact laws, which would deprive a citizen of the United States of the right to a physician's unhampered judgment as to the quantity of vinous or spirituous liquors, which may be necessary for the treatment of his diseases in any given period of time.

Eleventh. The Court erred in holding that "for the same reason which leads the law making power of a state or of the United States to prohibit the use of liquor containing a less amount of alcohol than is required to make it intoxicating, the law making power may restrict the physician as to the amount of such liquor he can prescribe to his patients in a given period."

Twelfth. The Court erred in refusing to hold that there was a [fol. 69] distinction between the beverage use of vinous and spirituous liquors and the medicinal use thereof.

Thirteenth. The Court erred in refusing and failing to recognize that the prescription of vinous or spirituous liquors for medicinal purposes is not "a beverage purpose" within the meaning of the Eighteenth Amendment to the Constitution, as ratified by the several states of the Union

Fourteenth. The Court erred in refusing to hold that a physician's right to prescribe alcohol in the treatment of disease is inherent and further erred in refusing to hold that a patient's right to such a prescription, in accordance with his physician's best judgment, is inherent.

Fifteenth. The Court erred in refusing to hold, as was held by the District Court, that Congress after recognizing that spirituous liquor had a legitimate medicinal use, proceeded arbitrarily without reference to the quantity of liquor actually required for the proper treatment of a particular ailment from which a patient may be suffering, and irrespective of the good faith, judgment and skill of the physician in attendance, to limit the amount to be prescribed to no more than a pint within a period of ten days.

Sixteenth: The Court erred in refusing to hold, as was held by the District Court, that the prohibition in the legislation "does not purport to be based upon any finding as to the quantity of liquor that reasonably and properly may be required within a specified period for the treatment of a disease."

Wherefore, the appellee prays that the decree of the United States [fol. 70] Circuit Court of Appeals for the Second Circuit be reversed; that the United States District Court for the Southern District of New York be directed to reinstate the bill of complaint herein and the order of that Court granting a preliminary injunction be affirmed and the injunction be made permanent.

Davies, Auerbach & Cornell, Solicitors for Appellee, No. 34 Nassau Street, Borough of Manhattan, City of New York.

[fols. 71-73-] Bond on Appeal for $1,000—Approved and filed Feb. 6, 1925; omitted in printing

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[fol. 74] In United States District Court

Clerk's Certificate

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 73 inclusive, contain a true and complete

transcript of the record and proceedings had in said Court, in the case of Edward C. Yellowley et al., Appellants, against Samuel W. Lambert, Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of February in the year of our Lord One Thousand Nine Hundred and twenty five and of the Independence of the said United States the One Hundred and forty ninth.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 75] CITATION—In usual form, showing service on Wm. Haywood; omitted in printing

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Endorsed on cover: File No. 30,912. U. S. Circuit Court of Appeals, Second Circuit. Term No. 301. Samuel W. Lambert, appellant, vs. Edward C. Yellowley, as acting Federal Prohibition Director; David H. Blair, as Commissioner of Internal Revenue, and William Hayward, as United States Attorney. Filed February 28th, 1925. File No. 30,912.

Argued by
Joseph S. Auerbach

Supreme Court of the United States

OCTOBER TERM, 1924

No. ~~301~~ 47

SAMUEL W. LAMBERT

Appellant

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; DAVID H. BLAIR, as Commissioner of Internal Revenue, and EMORY R. BUCKNER, as United States Attorney for the Southern District of New York

Appellees

BRIEF FOR APPELLANT

JOSEPH S. AUERBACH
Attorney for Appellant

JOSEPH S. AUERBACH
MARTIN A. SCHENCK
EMILY C. HOLT
Of Counsel

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Supreme Court of the United States

OCTOBER TERM, 1925.

SAMUEL W. LAMBERT, Appellant, *against* EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; DAVID H. BLAIR, as Commissioner of Internal Revenue, and EMORY R. BUCKNER, as United States Attorney for the Southern District of New York.	No. 301.

APPELLANT'S BRIEF.

The suit involves the constitutionality of those portions of the Volstead Act and of the Willis-Campbell Act which, without qualification or exception, prohibit prescriptions of liquor as medicine beyond one pint (½ pint alcoholic content) in ten days.

The complainant, Samuel W. Lambert, appeals under Section 6 of the Act of March 3, 1891 (Section 241, Judicial Code), from a judgment of the Circuit Court of Appeals of the Second Circuit reversing a decree of the District Court and dismissing his bill (fols. 61, 62).

The questions arise on the Government's motion to dismiss the complaint (Rec., p. 11, fol. 21). Such motion admits the facts alleged in the complaint (*Street* v. *Lincoln Safe Deposit Co.*, 254 U. S., 88, at 89).

The District Court, per Knox, J., held that the Acts in the respects complained of were unreasonable and arbitrary and accordingly unconstitutional, denied defendants' motion to dismiss and granted an injunction (Rec., p. 18, fol. 35; Opinion, pp. 12-18; 291 Fed., 640). Defendants then appealed to the Circuit Court of Appeals under Section 7 of the Act of March 3, 1891 as amended (Section 129 of the Judicial Code) to review the interlocutory order of injunction.

The Circuit Court of Appeals, per Rogers, C. J., reversed the decree, dissolved the injunction and directed a dismissal of the Complaint (Rec., p. 33, fols. 61, 62; Opinion, pp. 21-32; 4 F. [2d] 915). That was a final decree, and as the jurisdiction of the Court had been invoked on the ground that the suit was one arising under the Constitution and an act of Congress, the appeal herein was rightly allowed (fols. 63-65). Nor does Section 128 of the Judicial Code vest the Circuit Courts of Appeals with final appellate jurisdiction over cases arising under the National Prohibition Act. (*United States Fidelity & Guaranty Co.* v. *Bray*, 225 U. S., 205, 214, 215; *Smith* v. *Vulcan Iron Works*, 165 U. S., 518; *American Construction Company* v. *Jacksonville, Tampa and Key West Railway Co.*, 148 U. S., 372, 385). That the suit involves more than the jurisdictional amount is alleged in the complaint (fol. 5) admitted by the procedure of dismissal and found by the Circuit Court of Appeals (fol. 47).

See also:

Wiley v. *Sinkler*, 179 U. S., 58;
Barry v. *Edmunds*, 116 U. S., 550, 560;
Bitterman v. *Louisville & Nashville Railroad*, 207 U. S., 205, 225.

Statement of Facts.

The complainant is a physician engaged continuously since 1888 in the practice of medicine in the City of New York (fols. 5, 6). As the opinion below states, it is conceded that he is a man of great distinction in his profession and of wide and unusual experience in the practice of medicine (fol. 43). By virtue of training and studies and compliance with State regulations, he acquired the right to practice medicine in the healing and cure of the sick and in the protection of human beings against attacks of disease (fol. 5).

It is an essential part of complainant's right as a physician and of his duty toward his patients to treat their diseases and to promote their physical well-being according to the untrammelled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such medicines and medical treatment as in his opinion are best calculated to effect their cure and establish their health (fol. 6).

It is the belief and judgment of Dr. Lambert, based on his experience and observation and the study of medical science, that the use as a medicine of spirituous liquors, to be taken internally, is, in certain cases, necessary for the proper treatment of patients in order to afford relief from known ailments (Par. 8, fols. 6, 7).

In prescribing drugs and medicines, the determination of the quantity to be used involves a consideration of the physical condition of the patient.

> "It is the belief of complainant, based upon his experience and observation and the study of medical science, that in the use of spirituous liquors as medicine it is in certain cases, *including cases now under complainant's observation and subject to his*

professional advice, necessary in order to afford relief from some known ailment, that the patient should use internally more than one pint of such liquor in ten days, and that it is in certain cases necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant conceives it to be his duty, and intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment" (Complaint, Par. Ninth, fol. 7).

Dr. Lambert has never prescribed and does not intend to prescribe the use of liquor for beverage purposes. He does not intend to advise or prescribe the use of liquor as a medicine unless, after careful physical examination of the patient, he in good faith believes that the use of such liquor as medicine by the patient is necessary and will afford relief to him from some known ailment (Complaint, Par. Tenth, fol. 7).

The complaint then sets forth the provisions of the National Prohibition Act and of the supplemental Act prohibiting the prescription of spirituous liquor by a physician to a patient in amounts of more than one pint within a period of ten days or containing more than one-half pint of alcohol (Complaint, Pars. Eleventh, Twelfth, fols. 8, 9).

It is then alleged in Paragraph Thirteenth of the complaint that the portions of such Acts as prohibit physicians from advising or prescribing the use of more than one pint of spirituous liquor within ten days, are beyond the authority conferred upon Congress by the Eighteenth Amendment to the Constitution, and are void and of no effect.

The threats of the defendants to enforce these provisions of the Acts against Dr. Lambert and against physicians similarly situated are set forth in Paragraphs Fourteenth and Fifteenth.

A representative character has been given to the suit by the fact that the complainant sues not only on his own behalf but in the interest of a large number of physicians of distinction in their profession who find themselves prohibited from rendering to their patients the essential service dictated by their best skill and judgment (Complaint, Par. Fifteenth, fol. 10).

The resolution of these physicians, attached as Exhibit A to the complaint, shows that *the subject should be dealt with by regulation rather than by the prohibition set forth in the Acts.*

The particular part of the National Prohibition Act complained of herein (Section 7 of Title II), after recognizing that the prescription of alcoholic liquor as a medicine may, in the good faith of the physician, be necessary to afford relief from a known ailment, proceeds without qualification to prohibit more than one pint in any period of ten days. It is as follows:

> "No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. *Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days.*"

See also the Willis-Campbell Act (an Act Supplemental to the National Prohibition Act, Act of November 23, 1921), Section II.

POINT I.

Beverage purpose the antithesis of medicinal use. The Eighteenth Amendment in prohibiting Beverage purpose does not prohibit, or delegate the power to prohibit, medicinal use.

(a) *Limitations inherent in the terms of the Amendment.*

The Eighteenth Amendment, which is the sole claimed source of Congressional power in this matter, is as follows:

> "Section 1.—After one year from the ratification of this article the *manufacture, sale or transportation* of intoxicating liquors within, the *importation* thereof into, or the *exportation* thereof from the United States and all territory subject to the jurisdiction thereof for *beverage purposes* is hereby prohibited.
>
> "Section 2.—The Congress and the several States shall have concurrent power to enforce this article by *appropriate* legislation."

(1) *Limitations as to relationship.*

The terms of the Amendment show a limitation to five distinct and well known relationships in liquor: its manufacture, its sale, its transportation, its importation, its exportation. And the only object in specifying relationship was to limit the prohibition.

Medicinal use of liquor at the time of the drafting and adoption of the Amendment was well known and common. The prescription of alcoholic liquor for medic-

inal purposes was a long recognized relationship. Such relationship is not prohibited and is not inferentially to be included within any of the five specified prohibited relationships.

(2) *Limitation as to purpose.*

The Amendment contains a further clearly defined limitation which modifies and controls each of the five definite classes of prohibited relationships. Neither manufacture, nor sale nor importation, nor exportation nor transportation of intoxicating liquors is prohibited unqualifiedly and for all purposes. They are prohibited for one specific class of purpose. They are prohibited only *"for beverage purposes."*

Here also it would have been easy to express a general and sweeping prohibition. The mentioning of the specific purpose is solely as a limitation. Where the remainder of the subject matter is left in other jurisdictions, the granting of power to Congress under this phraseology is necessarily a limitation to the purpose expressed.

For example, industrial use is not prohibited. And it has been well held that there is "nothing in the Eighteenth Amendment grounding such power" to prohibit industrial use and *that the use of alcohol for non-beverage purposes is a right protected by due process of law* (*McGill* v. *Mellon*, 5 F. [2d], 262, 263). Powers of definition and regulation present quite another question (*Selzman* v. *United States*, 268 U. S., 466).

At the time of the drafting and ratification of the Amendment, the term "beverage purpose" in prohibition legislation had a generally accepted meaning. *Beverage purpose was the antithesis of medicinal use.*

In *Commonwealth* v. *Mandeville*, 142 Mass., 469, in construing a prohibition statute containing the same phraseology, the Court, per Holmes, J., at page 469, said:

> "Sales of liquors to be used *as a beverage* were spoken of by way of *antithesis* to sales *for medicinal purposes*, and signified sales of liquors *to be drunk for the pleasure of drinking, as distinguished from sales of liquors to be drunk in obedience to a doctor's advice.*"

In *Gue* v. *City of Eugene*, 100 Pac., 254 (Oregon), the Court, in construing a prohibition statute, at page 256, said:

> "'The use of liquor *as a beverage,*' say the editors of Words and Phrases (Volume 1, p. 769), 'does not mean simply that the same is to be drunk, but the word "beverage" is used *to distinguish the act of drinking liquor for the mere pleasure* of drinking *from its use for medicinal purposes.*'"

See also:

> *State* v. *Roach*, 75 Me., 123;
> *State* v. *Costa*, 62 Atl. (Vt.), 38.

The Amendment, thus by use of terms of well accepted statutory meaning shows an affirmative intention that prohibition of medicinal use be excluded from the power conferred upon Congress.

Furthermore, power to prohibit medicinal use, to be included in the powers delegated would, under well known rules of construction have to be specifically mentioned.

In *Busch & Co.* v. *Webb*, 122 Fed., 655 (appeal dismissed, 194 U. S., 640), the District Judge, in declaring that such portion of a State statute was unconstitutional which prohibited physicians not in active practice from

prescribing liquor as a medicine, quoted with approval from the opinion in *Bowman* v. *State*, 40 S. W., 796, as follows:

> "It was further known at the time that alcohol in various forms was in common use among the people, in case of sickness, *for medical purposes;* alcohol in various forms entering into combination with many of the most useful medicines belonging to the profession. *These were not evils to be provided against*, but *privileges to be conserved*, and it is not inimical to a proper construction of the provisions of the Constitution in question to interpret it in the light of the surrounding circumstances under which it was adopted."

In *Thomasson* v. *The State*, 15 Ind., 449, in interpreting a statute of absolute prohibition, the Court held, to quote the headnote:

> "Though the law of March 5, 1859, regulating the sale of spirituous liquors, contains no exception of sales made for medicinal or sacramental purposes, the Court will make the exception in proper cases."

In *State* v. *Larrimore*, 19 Mo., 391, the statute contained no exception in favor of the sale of liquor by a physician as medicine. Nevertheless it was held that the statute must be so construed as to include such an exception. The Court, in reversing the conviction, said:

> "If a physician, upon his professional judgment that a sick person needs brandy, administers it as a medicine, in good faith, and charges for it, he is not to be punished; because such liquor, properly used, is a valuable medicine."

See also

Sarrls v. *Commonwealth*, 83 Ky., 327, at 331;
Nixon v. *The State*, 76 Ind., 524.

The conclusion of Judge Knox below, it is respectfully submitted, is sound (fol. 27; 291 Fed., at 642).

> "The Eighteenth Amendment to the Constitution was designed to bring about the prohibition of intoxicating liquor 'for beverage purposes,' and was not, I think, intended to put an end to the use of liquor for purposes regarded by those who proposed the amendment, and by many of the States that ratified it, as justifiable and proper."

(3) *Limitation as to method of enforcement.*

The Amendment sets forth a third separate class of limitation. The enforcement of the powers delegated under Section 1 must, in accordance with Section 2, be by *appropriate* legislation.

This, we respectfully submit, incorporates in the amendment the doctrine laid down by this Court that Congress cannot, in the exercise of the powers thus carefully limited, under the guise of enforcement, extend its powers to matters inappropriate (see Point II herein).

It is respectfully submitted that the Circuit Court of Appeals below, in contradiction to the rule laid down by this Court in *United States* v. *Harris*, 177 U. S., 305, at 309, has departed from the settled meaning of the terms of the Eighteenth Amendment in order to bring the medicinal use of liquor within its prohibition.

It is impossible to attribute inadvertence or oversight to the framers of the Amendment in the use of these various limitations. The conclusion of the Court below, that a physician's right to prescribe alcohol in the treatment of disease is not inherent, and that it can be controlled and prohibited by Congress under this Amendment (fol. 60), is a violation, we respectfully submit, of these limitations inherent in the Amendment itself.

This Court, in *National Prohibition Cases*, 253 U. S. 350, at 387, has stated that "there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement." All three classes of limitation, we respectfully submit, have herein been transgressed.

(b) *Preservation of medicinal use, a part of the Amendment as submitted and ratified.*

The States, when they ratified the Amendment, not only were justified in relying upon the fact that under the very phraseology of the Amendment, as such terms had been used in the construction of prohibition laws by the courts, medicinal use was reserved; but could rely upon the express assurance of that fact given by the Senate Judiciary Committee in reporting the measure.

Judge Knox below stated (fols. 29, 30; 291 Fed., 644):

> "As bearing upon what was sought to be accomplished through the instrumentality of the Eighteenth Amendment, I quote from the Report of the Senate Judiciary Committee, dated June 11, 1917, in which the adoption of a concurrent resolution submitting amendment to the States was recommended. The Committee in setting forth some of the arguments advanced by proponents of the measure reported the following:
>
> "'National law, enacted under an amended Constitution, could prohibit transportation and sale, and in concurrence with like legislation by the States (the union of the power of the nation and the power of the states), thus securing the entire strength of the whole community, could soon put an end to the traffic. Under such restriction in a generation or two the consumption of alcohol as a beverage would practically disappear. Alcohol would still be manufactured,

distributed and sold under the restrictions appertaining to other poisons; and *its use as a medicine and in the arts would not be interfered with.* Its manufacture and distribution would be controlled by like regulations as those made with reference to dynamite, nitroglycerine and gunpowder, and the whole family of poisons, and in fact, all articles of great and dangerous potency which, nevertheless, *have their legitimate uses for the benefit of mankind.'*

"I have little or no doubt that it was the impelling force and *reasonableness* of the thought expressed by the foregoing quotation that brought about the submission of the amendment to the several States, and *was responsible for its ratification by forty-five of them.*"

POINT II.

Prohibition of medicinal use inappropriate to reasonable enforcement of prohibition of beverage purpose.

The physician, as this Court has recognized, is one whose relationships to life and health are of the most intimate character. He must possess the knowledge of diseases and their remedies, and also be safely entrusted to apply those remedies. It is thus the province of the States to require safeguards upon his character, his training, his knowledge,—all for the purpose of securing to the patient an honest exercise of trained and intelligent judgment in the application of remedy to disease.

Hawker v. *New York*, 170 U. S., 189, at 194;
Dent v. *West Virginia*, 129 U. S., 114, 122.

See also:

Tiedeman, Control of Persons & Property, Sec. 85, p. 239;
Freund, Police Power, Sec. 650.

The National Prohibition Act itself recognizes that the physician of trained judgment may properly determine that the prescription of alcoholic liquor is necessary to the treatment of a patient suffering from some known ailment. The Act itself recognizes that medicinal use is not a beverage purpose.

In Section 6 of Title II, it is provided that no one shall be given a permit "to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession." It is also provided that no permit shall be issued until a verified application shall have been made setting forth the qualification of the applicant and the purpose for which the liquor is to be used. Section 7 recognizes the use of liquor as a medicine and provides that no physician shall prescribe liquor unless, after careful physical examination of the person for whose use the prescription is sought, he in good faith believes that *the use of such liquor as a medicine by such person is necessary* and will afford relief to him from some known ailment. Section 8 recognizes that there may be cases of emergency in the prescription of alcoholic liquor. The emergency, however, is merely allowed to affect the formality of a prescription and does not in any way qualify the rigid prohibition of more than one pint in ten days.

This recognition on the part of Congress, that in the honest trained judgment of a physician the prescription of alcoholic liquor according to fair medical standards,

may be necessary to the cure of a patient, emphasizes the unreasonableness and arbitrary character of the rigid prohibition of more than one pint in ten days, regardless of the judgment of the physician and regardless of the need of the patient.

As Judge Knox well said below (fol. 26; 291 Fed., at 642):

> "For the purposes of this motion, it is sufficient to accept the allegations of the complaint, and to consider that Congress itself, in the very legislation under attack, has recognized that in certain cases liquor has a legitimate medicinal use, and has specified the circumstances under which it may be prescribed in given instances. The difficulty is that having done so, *Congress, without reference to the quantity of liquor actually required for the proper treatment of a particular ailment from which a patient may be suffering and irrespective of the good faith, judgment and skill of the physician in attendance, proceeds to limit the amount to be prescribed to not more than a pint within a period of ten days.*"

The Act supplemental to National Prohibition is, in this respect, of the same arbitrary character. It recognizes the distinction between medicinal purposes and beverage purposes but the physician is prohibited from prescribing "more than one-half pint of alcohol, for use of any person within any period of ten days."

As Judge Knox pointed out below (fol. 29, 291 Fed., 641), this legislation, of which Dr. Lambert complains, is not based upon any finding as to the quantity of liquor that reasonably and properly may be required within a specified period for the treatment of disease.

As indicating some of the necessities arising in the prac-

tice of medicine, we submit in an appendix medical authorities and a chart of the required dosage in treatment of different diseases. One-half pint of alcoholic content in ten days eliminates any adequate prescription of liquor as a remedy in diseases running a course requiring it.

Congress, after having recognized that some amount may be necessary, without looking into the question as to what amount will be required in the treatment of various diseases, rigidly fixes upon a useless, unreasonable and an arbitrary maximum amount and prohibits all else.

In the event that the patient in the preceding nine days has had on a doctor's prescription one pint of alcoholic liquor, he cannot, on the tenth day, no matter what his need or his physician's trained opinion as to his necessities, have one drop more. His illness may take a sudden turn for the worse. An entirely new ailment may intervene, making prescription essential to prevent death. The Act contains no exceptions or qualifications. The prohibition is absolute.

The question as to reasonableness has been peculiarly centered upon these particular spirituous liquor provisions of the Volstead Act and of the supplemental Willis-Campbell Act. For this Court in *Everard Breweries* v. *Day*, 265 U. S., 545 (following *United States* v. *Doremus*, 249 U. S., 86), sustained the prohibition of malt liquor for medicinal purposes on the ground that Congress had taken testimony upon the subject of malt liquors and had determined in effect that they possessed no substantial or essential medicinal properties which made it necessary that their use for medicinal purposes should be permitted; and that as a matter affecting public health, "it was sufficient to permit physicians to prescribe spirituous and vinous intoxicating liquors."

When this Court is now, however, called upon to determine this particular question, which, as the Circuit Court of Appeals below has stated, is new (fol. 51), the outstanding feature of the legislation is that it proceeds upon no investigation in regard to the facts, that it recognizes the necessity but prohibits the remedy, and that it has no relationship, in appropriateness, to the enforcement features of the powers delegated.

As a practical matter, the only constitutional guarantee of the citizen in such a situation is that this Court will insist upon the doctrine of appropriateness which has here been incorporated into the fundamental law by the very terms of the amendment. Unless this is insisted upon, under guise of enforcement features, distinctions between powers of Congress and powers of the States are lost, and matters never intended to be delegated by States to Congress are, nevertheless in violation of the terms of the grant, appropriated. (*Lochner* v. *New York*, 198 U. S., 45, at 56, 57, 64.)

Nothing could be more arbitrary than for a statute, ostensibly designed to promote public health, to recognize the medicinal use of alcoholic liquor and at the same time blindly and flagrantly to prohibit such use, in necessary quantities. Nothing could be more unreasonable and arbitrary than to recognize that the subject is within the judgment of the physician, but at the same time to prohibit the exercise of that judgment. In a word, the legislation proceeds upon the theory that health may depend upon a prohibition of cure. Possibilities of abuse in this subject are remote from the actual necessities of use.

Freund, Police Power, page 210, §223:

> "All prohibitory laws make an exception in favor of sales for medical purposes. This is not a legis-

> lative indulgence but a constitutional necessity, *since the state could not validly prohibit the use of valuable curative agencies on account of a remote possibility of abuse. 'The power of the legislature to prohibit the prescription and sale of liquor to be used as a medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale for religious purposes.'"* (*Quoted from Sarris* v. *Commonwealth*, 83 Ky. 327.)

It is respectfully submitted that this Court has on closely analogous facts arrived at the conclusion of unreasonableness of such legislative provisions, and that the resultant control of medical practice in the States is inappropriate and unnecessary to reasonable enforcement.

In *Linder* v. *U. S.*, 268 U. S., 5, the Court, at page 18 said:

> *"Obviously, direct control of medical practice in the states is beyond the power of the Federal government. Incidental regulation of such practice by Congress* through a taxing act *cannot extend to matters plainly inappropriate and unnecessary to reasonable enforcement* of a revenue measure. The enactment under consideration levies a tax, upheld by this court, upon every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away opium or coca leaves or derivatives therefrom, and may regulate medical practice in the states only so far as reasonably appropriate for or merely incidental to its enforcement. It says nothing of 'addicts' and does not undertake to prescribe methods for their medical treatment. They are diseased and proper subjects for such treatment, and *we cannot possibly conclude that a physician acted improperly or unwisely or for other than medical purposes solely because*

> *he has dispensed to one of them, in the ordinary course and in good faith, four small tablets of morphine or cocaine for relief of conditions incident to addiction. What constitutes bona fide medical practice must be determined upon consideration of evidence and attending circumstances.* Mere pretense of such practice, of course, cannot legalize forbidden sales, or otherwise nullify valid provisions of the statute, or defeat such *regulations* as may be *fairly appropriate* to its enforcement within the proper limitations of a revenue measure."

We regard this case as holding (1) that medical practice is beyond control of the Federal government; (2) that it may not be prohibited in any respect; (3) that its regulation must proceed upon evidence and be appropriate to enforcement. In fact this Court therein at page 22 specifically stated that any act which would prohibit a physician prescribing "*bona fide* and according to *fair medical standards*" would be drastic and would encounter grave constitutional difficulties.

In *United States of America* v. *Daugherty* (70 Lawyer's Edition, 169), decided by this Court on the 4th of January, 1926, and not yet officially reported, this Court, in regard to the same statute said:

> "The constitutionality of the Anti-Narcotic Act, touching which this Court so sharply divided in *United States* v. *Doremus*, 249 U. S. 86, was not raised below and has not been again considered. The doctrine approved in *Hammer* v. *Dagenhart*, 247 U. S. 251; *Child Labor Tax Case*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44, 67; and *Linder* v. *United States*, 268 U. S. 5, may necessitate a review of that question if hereafter properly presented."

The solicitude that abuse may grow up in connection with

the prescription of liquor as a medicine may justify regulations. Such regulations Dr. Lambert and the Society for the Protection of Constitutional Rights and the American Medical Association welcome and are solicitous to promote. It does not justify prohibition. The administration of the remedy is for the health of the patient. Because in certain cases the remedy may be inappropriate is no justification for a prohibition of its appropriateness. Fundamental guarantees of the Constitution cannot be freely submerged whenever ostensible justification is advanced.

> *Adams* v. *Tanner*, 244 U. S., 590, 594;
> *Children's Hospital* v. *Adkins*, 284 Fed., 613 (affirmed 261 U. S., 525).

This Court in *Everard Breweries* v. *Day*, 265 U. S., 545, at 563, held that the question of reasonable necessity was in reality a question of fact. In the case at bar, Congress, as has been said, has never in stigated into that question of fact, but has arbitrarily indulged in a prohibition on a subject beyond its delegated power.

The unreasonableness is so glaring that it has been twice found and determined by Trial Courts.

In *U. S.* v. *Freund*, 290 Fed., 411, at 413 and 414, Judge Bourquin held that the provisions of the statutes in regard to the amount of alcohol to be prescribed by the physician were arbitrary, unreasonable and thus invalid. He concluded that it was an extravagant and unreasonable attempt to subordinate the judgment of the trained physician to that of Congress in respect to matters with which the former alone is competent to deal, that it infringes upon the duty of the physician to prescribe in accordance with his honest judgment, and upon the right of

the patient to receive the benefit of the judgment of the physician of his choice.

In the case at bar, Judge Knox held (fol. 28; 291 Fed., 643), that on the admitted allegations of the complaint, that more than a pint of liquor within ten days is necessary for the treatment of certain known ailments, the statute admits that the use of liquor may be necessary; but at the same time prohibits its use; and concluded:

> "If this be true, it would seem not to be a function of the Congress—particularly, under the amendment, to invade, as it were, the domain of medical authority, and to deprive patients of that which they need, and, by every principle of right and justice, are entitled to have. Having assumed so to do, it would appear that the action *does not constitute legislation appropriate to the object sought to be attained through the adoption of the amendment.* To me it seems reasonably clear that *the right of the public to have available for its use when required in the proper treatment of disease, an adequate supply of a valuable therapeutic agent, transcends the present power of Congress to decree otherwise upon the basis of expediency or policy.*"

As an enforcement measure, what can be said in justification of these statutory provisions which prohibit liquor as a medicine to a person recognized as needing it for his health, on the hazard that it may reach a person who does not need it for his health? This substitutes a certain injury for a hazard of diversion. And what can be said in justification of these provisions of the statute as a health measure, when they prohibit persons trained in the administration of remedies from administering necessary remedies to the sick?

These clauses, which rigidly and flagrantly ignore not

only the ordinary requirements in the treatment of known ailments but emergencies and exceptional cases involving the issues of life and death are obviously arbitrary and unreasonable in that adequate regulation, as distinguished from prohibition, is appropriate to the subject. As Judge Knox held below (fol. 29), 291 Fed. at 643:

> "The danger that persons bent upon a violation of the Volstead Law may through the medicinal use of liquor, be furnished with a means of procuring intoxicants for beverage purposes, is to be overcome through regulations. *These may be of the most stringent character, but they must, in my opinion, fall short of an actual prohibition.*"

The Appendix, attached to the complaint, constituting resolutions of the body of physicians on whose behalf the action was brought, suggest definite and appropriate regulations upon this subject.

POINT III.

Control of medical practice in the States is beyond the power of the Federal Government.

Dr. Lambert is licensed, under the Laws of the State of New York, to practice medicine. Under Section 160 of the Public Health Law of that State, he holds himself out as not only able to diagnose, but to prescribe.

Clauses in these Federal statutes prohibit his prescription of more than one pint of liquor in ten days, although, in his trained judgment, such prescription is necessary to the cure of patients now under his observation and treatment. The Act of Congress, therefore, controls his practice of medicine in this its essential feature.

The Circuit Court of Appeals has concluded herein that Congress can in this respect control the practice of medicine but this Court has held that such control of medical practice in the States is beyond the power of the Federal Government.

In *Linder* v. *United States*, 268 U. S., 5, this Court said (p. 17):

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something specially within power reserved to the States, is invalid and cannot be enforced. *McCulloch* v. *Maryland*, 4 Wheat., 316, 423; *License Tax Cases*, 5 Wall., 462; *United States* v. *DeWitt*, 9 Wall., 41; *Keller* v. *United States*, 213 U. S., 138; *Hammer* v. *Dagenhart*, 247 U. S., 251; *Child Labor Tax Case*, 259 U. S., 20."

Inasmuch as the United States lacks the police power (*Hamilton* v. *Kentucky Distilleries*, 251 U. S., 146, at 156) the limitations enumerated in the terms of the Eighteenth Amendment preclude any argument that there was an intention that the police power of the States, in regard to the regulation of medicine, be interfered with.

> *Barbier* v. *Connelly*, 113 U. S., 27, at 31;
> *Hammer* v. *Dagenhart*, 247 U. S., 251;
> *Bailey* v. *Drexel*, 259 U. S., 20, at 37.

This Court in *Jacobson* v. *Massachusetts*, 197 U. S., 11, at 29, has said, that there is a sphere within which the

individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will.

Recognizing fully that the life of the citizen is subject to the necessity of the government in time of war, the question still remains whether the life of the citizen in times of peace is subject to policies of expediency. When the citizen is ill and his very life depends upon liquor prescribed by a physician is the life of the citizen to be sacrificed on the hazard that the liquor may be diverted? Should not adequate regulations deal with the hazard of diversion and at the same time, leave open the possibility of saving the life?

POINT IV.

As a substitute for the unconstitutional prohibitions in the Volstead Act there can be appropriate, comprehensive and effective regulations.

The provisions under the so-called Harrison Anti-Narcotic Act which make it a crime to give drugs to addicts, this Court has recently intimated, show the same unconstitutional method on the part of Congress in dealing with the practice of medicine. (*United States* v. *Daugherty, supra.*) Congress cannot, under either its taxing power or under its enforcement of a limited delegated power, prohibit, rather than merely regulate, these two far reaching classes of remedy.

And we repeat what was so forcefully said by Judge Knox (291 Fed., 643):

> "*The danger that persons bent upon a violation of the Volstead Law may through the medicinal use*

of liquor, be furnished with a means of procuring intoxicants for beverage purposes, is to be overcome through regulations. These may be of the most stringent character, but they must, in my opinion, fall short of an actual prohibition."

And in so far as such regulations have this purpose in view, Dr. Lambert and all like physicians would be required to conform to them. As will appear from the Appendix, the American Medical Association—the representative of all the leading physicians and surgeons of the United States—is in accord with this view. Required is scarcely the appropriate word, so much would they welcome such restrictions.

There are many effective forms which such regulations might take.

The Association for the Protection of Constitutional Rights has suggested another regulation:

> "Further Resolved, that the members of this Association, however, favor and will advocate the enactment of such Regulations as will require physicians prescribing alcoholic liquor in such amounts as they deem proper, to file any and all prescriptions with properly designated Governmental authorities, in order that any abuse by unworthy practitioners of the right to administer alcoholic liquor may be prevented and the offenders adequately and summarily punished."

In association with this required filing of the prescription, the Government might well establish the Dispensing Depot, wherein could be obtained—what notoriously is often not now obtainable—proper medicinal liquor for internal and external use.

Then, further, any danger of evil can be reached effectively in other ways. Every physician whose impounded

prescriptions for alcoholic liquors should justify suspicion and investigation might properly be compelled to file an affidavit with the governmental authorities to the effect that he has prescribed liquor only for medicinal purposes. And at regular intervals he can be required to file an affidavit stating that, during the period between the filing of such affidavit and that of the preceding one, he has not prescribed any liquor for other than medicinal purposes. The affidavit, if false, could subject the offender, not to a fine of $500, but to the punishment for perjury—to the loss of his liberty and of his citizenship.

There are many other restrictions which Dr. Lambert and his associates believe can be resorted to for the elimination of the hazard of improper practise. There are in their opinion no pains and penalties too rigorous or unrelenting for the violators of the spirit and letter of the Amendment.

All such provisions, however, must, as has been pointed out, be directed against the use of alcoholic liquors for beverage purposes and not for medicinal purposes. They must in no wise trespass upon the right of the physician to heal and even save the sick according to his untrammelled judgment.

As has been stated, the provisions of the Volstead Act under Sections 6 and 10 in reference to wines for sacramental uses furnish illustration of the sole constitutional method of legislation by Congress as to liquors for medicinal purposes.

These, it will be seen, are in no wise prohibitions but merely regulations—designed to detect and apprehend and punish the violator who criminally diverts such wines to beverage purposes.

In this direction Congress and the Executive Depart-

ment may go to any reasonable length, dictated by wise judgment, as to liquors for medicinal purposes. They may proceed in no other direction and deal with prohibition instead of regulations. *They have conformed to the constitutional method in the case of intoxicating liquors for sacramental purposes and wholly departed from it in the case of such liquors for medicinal purposes.* For it will be noted that the Volstead Act, while containing the prohibition as to medicinal liquors, provides further that it "shall not be held to apply" to the manufacture, sale, transportation, importation, possession or distribution of wine for sacramental purposes (Sec. 6). Concerning this, Judge Knox made the following pertinent and illuminating comment (291 Fed., 612-3):

> "The eighteenth amendment to the Constitution was designed to bring about the prohibition of intoxicating liquor 'for beverage purposes' and was not, I think, intended to put an end to the use of liquor for purposes regarded by those who proposed the amendment, and by many of the States that ratified it, as justifiable and proper. This view was, in part at least, entertained by Congress in enacting the Volstead Law which permits the sale and use of sacramental wines; the use, in *bona fide* hospitals or sanitariums of such quantity of liquor, as may properly be administered under the direction of a duly qualified physician employed therein, to a person suffering from alcoholism; and the use of industrial alcohol under certain restrictions in arts and sciences. So far as the sacramental use of wine is concerned, there is no specific limitation of the quantity that may be purchased and consumed. Instead of manifesting the same solicitude for the physical well-being of a person suffering from a disease (other than alcoholism), the proper

treatment of which demands more than a pint of liquor within ten days, that it evinced for the spiritual comfort and welfare of members of certain religious sects, Congress restricted in the manner complained of, the medicinal use of intoxicating liquor."

CONCLUSION.

The statutes, in the respects complained of, exceed the powers delegated to Congress by the Eighteenth Amendment, have no real or substantial relation to appropriate enforcement, violate complainant's rights secured by the fundamental law, and are in such respects unconstitutional.

The judgment appealed from should be reversed and the decree of the District Court affirmed.

Respectfully submitted,

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APPENDIX OF MEDICAL DATA.

The Explanation and Results of the Referendum of Physicians on Behalf of the American Medical Association as to the Necessity of Alcohol for Treatment of Diseases.

"The Referendum on Alcohol.

"(Reprinted from the Journal of the American Medical Association, Jan. 21, 1922.)

"In hearings before Congress, in the discussion of regulations issued by the Internal Revenue Department, in fact, in practically every discussion of prohibition, contradictory statements have been made as to the views of physicians on the value of alcoholic beverages as therapeutic agents. Several scientific organizations have adopted resolutions on the subject. So far as we know, however, no attempt has heretofore been made to ascertain, in a direct way, the opinions of any considerable number of physicians.

"In order to secure the views of a representative portion of the medical profession a questionnaire was sent to more than one third—53,900—of the physicians of the United States.

"The excellent response, reaching 58 per cent. of replies and representing 21.5 per cent. of the physicians of the country, a percentage of return seldom attained by the questionnaire method, has been gratifying as an indication of the interest taken by our profession in this attempt to secure an adequate expression of its views.

"Some have taken exception to the word 'necessary,' claiming that no drugs are absolutely necessary, and that 'desirable' or 'advisable' would have been a better word for the purpose. This point was given careful consideration in formulating the question. Moreover, the word

'necessary' is used in the National Prohibition Act itself (Section 7, Title II):

> * * * And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is *necessary* [italics ours] and will afford relief to him for some known ailment.

"The word 'advisable' or 'desirable' would have been as much too mild as 'necessary' is, perhaps, too strong; 'necessary' does not mean indispensable, and it was properly regarded by practically all who answered the questionnaire.

"The criticism has been made that the question as to whether whisky is a necessary therapeutic agent is a scientific one and cannot be decided by resolutions or by votes. This is true; and the referendum was to secure the *opinions* of physicians on the subject, not to decide a scientific question. It is granted that the physiologic effects of alcohol are matters which may be determined in the laboratory; but therapeutics is the application of such findings to the treatment of disease as determined by the opinions of physicians. This and the experience of physicians—for the opinions necessarily are based on experience and observation—may be determined, as has been done, by the questionnaire.

"Approximately one-third of those replying commented on the general prohibition situation, on the restrictions and regulations, or on some allied topics. The more interesting of these comments have been published in connection with reports on the individual states. Many of

the views brought out in the comments are of value to those who are interested in the subject from the sociological or from any other point of view. For instance: Since National Prohibition went into effect, judging by these comments there has apparently been a reaction against prohibition in many states in which prohibition by state law had become accepted and effective. This is especially noticeable in the comments from Colorado, Kansas, Nebraska, South Dakota, and even from Maine. From the comments one must come to the conclusion that home-made, illegally distilled or chemically compounded liquors—so-called 'moonshine'—are being extensively used in states in which this was not the case three or four years ago. What has produced this apparent change?

"The questionnaire has brought out definitely the fact that the present regulations governing the medicinal use of alcoholic beverages are not satisfactory—in fact, many physicians declared them 'intolerable.' Many who were convinced that these drugs were not necessary therapeutically were emphatic in stating that other physicians who believed them necessary were entitled to have their views respected, and were warranted in efforts to have the drugs made available without incurring the odium attaching under the present regulation.

"Evidently most physicians are satisfied with the control of narcotics as regulated under the Harrison Narcotic (sic) Law, and many expressed a desire that the control of alcoholic liquors follow such lines. A decidedly large number of physicians suggest that the Government take over the whiskey, including its storage and sale, and supply it in sealed packages—say of 8, 16 and 32 ounces—for

medicinal use only, and at a fixed price, under regulations similar to those of the Harrison Narcotic (sic) Law, thus making available to physicians a drug of dependable quality."

The Questionnaire.

"Q. Do you regard whiskey as a necessary therapeutic agent in the practice of medicine? A. The total vote in all states on whether or not whiskey was *necessary* in the treatment of disease was 30,843; 15,625, or 51 per cent., answered yes, and 15,218, or 49 per cent., answered no."

Authorities Recommending the Use of Alcohol as a Curative Agent.

The late Dr. Abraham Jacobi was widely known and widely revered in his profession and among laymen. In an article on Alcohol Medication, published in American Medicine, New Series, Volume VIII, No. 9, pp. 575-577, written as recently as September, 1913, Dr. Jacobi says:

"An editorial in the July number of AMERICAN MEDICINE (p. 459) refers to the latest views on alcohol as expounded by Ewald. It states that 'all theories to the effect that it is to be classed as a stimulant are about exploded.' It is also asserted that 'those who are always waiting for some medical oracle to speak can now come over without fear to the modern consideration of alcohol as a sedative or anesthetic. The writer begs leave to say that the 'explosion' has not reached his ears. But then, he is quite willing to admit he is not an oracle, surely less so than Ewald who never claimed to be one. If he ever had done so, he would have forfeited his rights when, as the editorial says, he maintained that alcohol would no longer be used in illness. That time must never come, and as far as

I can see, should not come, *for there are conditions which absolutely demand the use of alcohol as a prominent part of medication.*

* * * * * * *

"I do not care to class alcohol anywhere. It has been called, or eulogized as a stimulant, a sedative, an anesthetic, an inhibitory and depressant power, aye as a paralyzer. I do not contest observations and experiments either on healthy or diseased men, and on animals. Indeed, I have great respect for experiments and observations in and out of our laboratories, and at your northern exposure windows. One of the most profitable laboratories, however, is the hospital and the private bedside. They have the advantage over an experiment on a dog or a rabbit, for while the experimenter on the latter is not infrequently devoid of clinical observation, when he publishes his result, the clinician seldom, if ever, appeals to the attention of his peers before he has confirmed his observations by scores or hundreds of cases. Great clinicians are more circumspect than loud. Hippocrates, the great, says more frequently than any of his successors, 'it seems to me.'

"Having been in uninterrupted contact with diphtheria since 1858 when it began its renewed murderous attack on our part of the world, I have anxiously looked for means to mitigate or heal what too often manifests itself as absolutely fatal. The virulent epidemic of forty years ago has furnished the formidable examples of sepsis and gangrene which in part were mitigated by my introduction of nasal irrigations, and sometimes restored to final health by local doses of alcoholic beverages. I shall return to that.

* * * * * * *

"When in 1860 I began to tracheotomize in diphtheritic laryngitis, I had three recoveries among my

first fives cases. They were published. Then—lo and behold, in the early seventies I had more than one hundred operations without a single recovery. So I learned wisdom and caution. That is why *after sixty years of practice when I trust in alcohol as a powerful remedy in cases of diphtheritic and other sepsis, I may be credited with ample experience both in successes and failures extending over half a century.* What I offer is no theory, and no laboratory experiments on the well or sick guinea pigs. My laboratory has been different. My life has been spent amongst the sick only, and the recovering and dying.

"A few stray specimens of my observation are as follows: With one of my most respected colleagues I saw thirty-five years ago a boy of five years. Membranes covered his fauces and mouth and part of the lips, and were visible in the nares. Round the neck were big lymph-body swellings, now known to all of us as the sure proof of thorough mixed infection. Some membranes could be removed by forcible injections into the nose. It had been bleeding and oozing; the odor was foul. The second heart sound still slightly perceptible, pulse 160, hardly felt at the wrist. Boy restless in his semi-coma, tossing about, feet bluish, not cold, covered with erosins and subcutaneous hemorrhages of different sizes. His whole surface discolored, from drab to blue; hemorrhages small and large in and under the skin. No intestinal hemorrhage. Urine could not be obtained. My friend told me I was not called by him but by the family of the dying boy; he was going downtown and on his way would order the undertaker to send the coffin after dark. I begged him not to do that, but to wait until to-morrow. The undertaker, however, came after dark and left disgusted. Meanwhile I had permission to act. The boy's stomach retained

my whiskey, from one to two teaspoonfuls every 15 or 25 minutes, diluted in water, occasionally in milk or coffee, and his rectum retained a few doses. Within a day he took a pint and a half, perhaps more. We kept on, the boy and I. He was alive when I happened to meet him twenty years afterwards.

"A girl of seven years I found in about the same condition thirty years ago. She was a patient of one of our great physicians who, when he died suddenly a year ago, proved to the world that there are some men who are indispensable. He said, 'Now, here, I have given your whiskey but she will die.' How much is she taking? 'Besides her other drugs she is taking as much as half a pint each of these two days, and retains it.' Very well, just continue, and I will give her my additional half pint. So we did, she took a pint or more daily. And got well.

"A boy of three years with the formidable symptoms of mixed infection was 'given up.' I held out the hope of recovery provided the doctor would suceed in getting into him with other appropriate medication, at least a pint of whiskey daily. He did succeed. Five days afterwards the father called in despair, saying his child was alive but insane. So he was, the boy was better; in fact, on the way to recovery, but drunk. To me that was a welcome occurrence, for I knew, and want my reader to know, that *no amount of whiskey will lead to intoxication when its effect is wanted to combat sepsis.* I repeat: No amount of alcohol will intoxicate a thoroughly septic person. As soon as my little patient did no longer require his big dose of alcohol, it made him 'insane,' intoxicated."

Austin Flint, M. D., L. L. D., says in the *Treatise on the Principles and Practice of Medicine*, page 983, with regard to the treatment of typhoid and typhus fevers:

> "Alcoholics have entered largely into the treatment of fevers in this country during the last thirty years. That they have been used too freely and indiscriminately can hardly be doubted. As a natural consequence, there is perhaps at the present moment a tendency to undervalue their importance. * * * Observation of their immediate offices in certain cases shows their utility—often in a very striking manner. * * * Used with proper application and moderation, they form an essential part of the supporting treatment of fevers as well as of all other diseases which destroy the life by asthenia."

James M. Anders says, in *A Text Book of the Practice of Medicine* (14th Ed., with assistance of John H. Musser, Jr.), page 50:

> "Alcohol is less commonly employed at present than formerly, it is of some value in combating unfavorable nervous symptoms due to the typhoid septicaemia. The quantity to be administered must be regulated by its effects, since it may act injuriously and even aggregate the symptoms though this is seldom the case. * * * Threatened collapse may be met by full doses of alcohol (½ oz. every hour). * * * Effective doses of diffusible stimulants, as champagne, are useful during periods of sudden circulatory depression."

Page 117.—Is against using alcohol in lobar pneumonia.
Page 138.—Recommends use of alcohol in influenza.

Page 167.—Recommends alcohol in septicaemia and pyaemia.

Page 209.—Recommends alcohol in scarlet fever.

James Tyson says, in *The Practice of Medicine* (6th Ed., with M. Howard Fussel), page 28:

> "Alcohol is not a heart stimulant as formerly supposed. That a certain amount may be utilized as food is certain. That alcoholics afflicted with typhoid fever need some form of alcohol seems certain, therefore alcohol is used in good doses 30 to 60 cc. every two or three hours in alcoholics in the early stages, but is gradually reduced in amount. * * *
>
> "When the heart muscle begins to flag, the pulse becomes rapid, and the patient extremely weak, doses of 15 to 30 cc. (½-1 oz.) may be given every two or three hours with good effect. * * * A low muttering delirium, feeble dicrotic pulse, and dry tongue are among the indications which imperatively demand small amounts of alcohol."

Page 40.—Typhus fever. Alcohol should be given as in typhoid.

Page 267.—Recommends alcohol in lobar pneumonia, in form of whiskey or brandy.

A. A. Stevens, M. A., M. D., Professor of Applied Therapeutics in the University of Pennsylvania, says in *The Practice of Medicine*, page 125, with regard to the treatment of diphtheria:

> "Notwithstanding the fact that much has been written against the use of alcohol many clinicians of long experience believe that this drug is decidedly useful when asthenia is pronounced. For a child of three or four years a dram may be given every three or four hours."

Hobart Amory Hare says, in a *Text Book of Practical Therapeutics*, page 78:

> "Notwithstanding the almost universal use of alcohol as a stimulant by the laity and the medical profession, it cannot be denied that evidence of scientific character and weight is constantly being brought forward which shows that its dominant action is depressant upon all parts of the body. • • • Nevertheless *clinical experience, too great to be ignored, stands for the continued employment of the drug.* The drug does not act as a stimulant in the ordinary sense of the term, but nevertheless readjusts the circulation by dilating the peripheral vessels and influences the protective powers of the body by affecting the blood cells or the blood stream or the lymph."

Oliver T. Osborne, in *The Principles of Therapeutics*, page 212, says:

> "The internal therapeutic use of alcohol should be entirely separated from a consideration of alcohol as a beverage or from the prohibition standpoint. Alcohol is a drug, and as such has many valuable uses. • • • There are times, for individuals who are weak, and in old age, when a little bitter tonic which contains alcohol, taken before meals, is perfectly legitimate treatment. In the age when alcohol could be obtained, it was a perfectly harmless proposition, in old age, with sleeplessness, to order a small amount of alcohol in the form best suited to the individual, to be taken before bed time. It is in such cases much less likely to do harm than is a stronger hypnotic drug."

Reynold Webb Wilcox says, in *Materia Medica and Therapeutics*, page 742:

> "*Alcohol is of immense advantage* in many instances of febrile disease. * * * It is by no means adapted for all varieties of fever, and hence its effects should always be carefully watched. * * * While it is often given when quite unnecessary, there are many instances in which it is of inestimable value in such affections as typhoid and typhus fevers, pneumonia, smallpox, cholera, and diphtheria and also in gangrene, phaemia, septicaemia, etc."

Dr. Delafield in his *Lectures on the Practice of Medicine*, delivered in 1882-3.

Treatment of Pneumonia:

Pulse full and frequent (120) is normal to pneumonia. If feeble and over 120, stimulate with alcohol, form according to patient, amount according to action on pulse. Alcohol has no other use in pneumonia, an ounce of brandy or whiskey every one-half hour is not too much if needed.

Treatment of Diphtheria:

In the general treatment of the disease there should be administered such drugs as will act upon the disease itself. Alcohol is the favorite with many, and may be in the form of wine or liquor. When the alcoholic treatment of diphtheria is spoken of, it is understood that alcohol is given not merely for the purpose of sustaining the patient, but, in addition, for its constitutional effect. With this end in view it is given in large and repeated doses and given early, and usually in a concentrated form, as brandy or whiskey. For an adult, a half ounce or an ounce of one of these is given every hour or half hour; to a child, a drachm or half a drachm of brandy or whiskey is given

every hour or every two hours. It is given in large quantities in this way with the idea of getting the physiological effect of alcohol upon the body, and this you observe is a very different thing from giving stimulants when the patient's strength begins to diminish. This plan of treatment is one which is a favorite with many practitioners, and it has seemed to be successful in some places. Besides using alcohol in this way, it may be used simply as a cardiac stimulant after the disease has lasted for some time and after the heart's action begins to flag.

Foreign Authorities.

British.

In the INDEX OF TREATMENT BY VARIOUS WRITERS, edited by Robert Hutchinson, M.D., and James Sherren, C.B.E., revised to conform with American usage by Warren Coleman, M.D., Assistant Professor of Medicine, University and Bellevue Hospital Medical College, Visiting Physician to Bellevue Hospital, New York, 1921:

LEWIS SMITH, M.D., F.R.C.P., Physician London Hospital—

Recommends iced champagne in small quantities in the treatment of Addison's disease.

GRAHAM STEELL, M. D., F.R.C.P., Emeritus, Professor Victoria University of Manchester, Consulting Physician Royal Infirmary, Manchester—

Recommends alcohol in the form of brandy in the treatment of angina pectoris.

W. J. HADLEY, M.D., F.R.C.P., F.R.C.S., Physician, Pathologist, and Lecturer in Medicine, London Hospital, Physician City of London Hospital for Diseases of the Chest—

Recommends judicious administration alcohol in cases of bronchial asthma. Believes that alcoholic stimulants are sometimes needed in the treatment of catarrhal broncho-pneumonia.

C. W. DANIELS, M. B., Camb., M.R.C.S., F.R.C.P., Lecturer Tropical Diseases London Hospital and London School for Medicine for Women. Physician, Albert Bock Hospital—

States that in the treatment of black water fever alcoholic stimulants are required after the second day.

CECIL WALL, M.A., M.B., Oxon., F.R.C.P., Physician London Hospital and Hospital for Consumption, Brompton, Consulting Physician Poplar Hospital—

Recommends stimulants in small quantities in the treatment of acute bronchitis and in the treatment of chronic bronchitis suggests increasing doses of the best brand of whisky obtainable.

E. W. GOODALL, O.B.E., M.D., B.S., Medical Supt. Northwestern Hospital, Hampstead—

Recommends strychnine, brandy and similar stimulants in cases of cardiac failure in diphteria. Recommends brandy up to 4 oz. in 24 hours, and in desperate cases 3 to 4 oz. of good champagne every 2 or 3 hours in cases of acute infectious diseases.

W. H. CLAYTON-GREENE, C.B.E., M.B., B.C. Camb., F.R.C.S., Honorary Consulting Surgeon Richmond Royal Hospital, Lecturer of Surgery St. Mary's Hospital Medical School, Surgeon St. Mary's Hospital, King Edward VII Hospital and King George Hospital—

States that alcohol may be required in the treatment of erysipelas.

ARTHUR P. LUFF, C.B.E., M.D., B.S.C., F.R.C.P., Consulting Physician St. Mary's Hospital—

Admits that alcohol may even be necessary or desirable in the treatment of gout, a disease in which alcohol must be avoided if possible.

BYROM BRAMWELL, M.D., F.R.C.P.E., LL.D., F.R.S.E., Consulting Physician Edinburgh Royal Infirmary—

Recommends alcohol as a stimulant in relieving urgent symptoms of cases of valvular heart disease.

E. W. GOODALL, O.B.E., M.D., B.S., Medical Supt. Northwestern Hospital, Hampstead—

States that in the treatment of measles when complicated with severe diarrhoea, stimulant is required in the form of brandy. For the same disease he prescribes two grains sulphate of quinine every 4 hrs. with an alcoholic stimulant in the form of brandy or Champagne. Prescribes for the treatment of scarlet fever hyperdemic injections of strychnine and brandy and Champagne by the mouth.

GRAHAM STEELL, M.D., F.R.C.P., Emeritus Professor Victoria University of Manchester, Consulting Physician Royal Infirmary, Manchester—

Says of the treatment in cases of myocardial failure "alcohol, no doubt, acts largely like a nitrate dilating the arterioles and so relieving the heart."

W. J. HADLEY, M.D., F.R.C.P., F.R.C.S., Physician, Pathologist and Lecturer in Medicine London Hospital, Physician City of London Hospital for Diseases of the Chest—

States with regard to the treatment of pneumonia that he personally prefers strychnine and digitalis for

cardiac stimulation before resorting to alcohol, but recognizes its necessity in some cases. He also commends the use of alcohol in pneumonia as a soporific to induce rest and sleep.

SIR ROBERT W. PHILIP, M.A., M.D., F.R.C.P.E., F.R.S.E., Senior Physician Royal Infirmary and Royal Victoria Hospital for Consumption, Edinburgh—

States that alcohol may be administered as a stimulant in the treatment of pulmonary tuberculosis according to the individual need. Whiskey, wine, beer or stout in various amounts may be given to the patient. He says further that "the administration of alcohol offers distinct advantages in the pyrexia of advanced disease * * * as to form, pure spirits (whiskey, brandy) is usually wisest diluted in milk or mixed with eggs and milk as egg flip or in alkaline water."

F. J. POYNTON, M.D., F.R.C.P., Physician University College Hospital, Physician Hospital for Sick Children, Great Ormond Street—

Recommends alcoholic stimulant in cases of acute rheumatism. He says "brandy and dry Champagne are the most useful stimulants."

GILBERT A. BANNATYNE, O.B.E., M.D., F.R.C.P., Consulting Physician Royal Mineral Water Hospital and Royal United Hospital, Bath—

Says of the treatment of rheumatoid arthritis "stimulants are often of service, especially sound wine; but each case must be considered separately and should the stimulant increase pains it must be discontinued." In the diet lists he includes "alcoholic drinks as prescribed (whiskey, wines and malt liquors)."

ROBERT HUTCHISON, M.D., F.R.C.P., Physician London Hospital and Physician Hospital for Sick Children, Great Ormond Street—

Says of the treatment of scurvy that "cider and the French and Italian wines are also curative drinks." and in seasickness "iced champagne may be given freely."

W. H. CLAYTON-GREENE, C.B.E., M. B., B. C. Camb., F.R.C.S., Honorary Consulting Surgeon Richmond Royal Hospital, Lecturer of Surgery St. Mary's Hospital Medical School, Surgeon St. Mary's Hospital, King Edward VII Hospital and King George Hospital—

States in case of septicaemia and pyaemia that "alcohol is of undoubted value, and may be used freely."

C. W. DANIELS, M.D., Camb., M.R.C.S., F.R.C.P., Lecturer Tropical Diseases London Hospital and London School of Medicine for Women, Physician Albert Bock Hospital—

In treating yellow fever says "alcoholic stimulants should not be resorted to at the commencement, but are usually required on or after the third day."

Arthur Latham, M.D., F.R.C.P., Physician and Lecturer on Medicine at St. George's Hospital, London, in the *Oxford Index*, says of the treatment of pneumonia, page 719:

"Stimulants should not be given as a routine measure but in accordance with the condition and previous habits of the patient. As soon as the pulse becomes at all unsatisfactory alcohol should be given in the form of old brandy or champagne. At first two to five ounces of brandy in the twenty-four hours is sufficient, but the quantity may have to be pushed to ten ounces."

French.

G. LYON, *Traité Elementaire de Clinique Therapeutique*, 1920, page 1369—

Infectious Diseases: With respect to alcohol, in all its forms, certain groups of cases must be distinguished. *Alcohol is useful in all typhoid conditions*, and should be administered especially in the form of old Bordeaux or Burgundy wines of which as much as a bottle daily may be given; dry champagne, well diluted with water (a quarter of a bottle), old whiskey or rum which serve to prepare "grogs"; "Kirsch," or cherry brandy, which is usually given in milk. Alcohol itself should be given only in relatively weak doses (50-60 G. daily). In mild or moderately severe cases of typhoid fever, the above-mentioned doses of alcohol represent the maximum allowance.

Alcohol in Pneumonia: An immense therapeutic advance was made by the institution of alcohol-medication, by Todd, first limited to the treatment of pneumonia and then extended to that of all other infectious diseases. In restricting the indications of alcohol Todd gave it only in the pneumonias of alcoholic patients and in adynamic or infections pneumonias. Loss of strength being the rule in aged and cachetic patients, alcohol is here invariably indicated, as well as in secondary pneumonias and ataxo-adynamic or typhoid pneumonias, with or without hyperthermia.

A. RICHARD, *Précis de Therapeutique et de Pharmacologie*, 1910, page 642—

"Since some years, a frequently equally exaggerated reaction seems to have set in against the old opinion, and alcoholic medication is now entirely rejected by some extremists. The majority of clinicians, however, still admit that alcohol, administered in moderate doses and temporarily, may be very useful in a cer-

tain number of febrile diseases, both as an accessory and easily oxydized food, and against the adynamic symptoms."

A. MARTINET, *Therapeutique Clinique*, 1921, Tome II, page 1137—

"Ac ording to recent findings, alcohol is an even better food for diabetic patients than suggested by older investigations. It diminishes to a considerable extent the formation of acetones, improves the assimilation of sugar, and favors still more than the fats, the metabolism of nitrogenous foods. It is therefore rational to replace in cases of severe diabetes a portion of the fats in the diet by alcohol."

M. MINELLE, *L'Alcohol en Therapeutique Infantile Maladies Aigües Febriles, These de Paris*, 1903. Speaking only of sick children, Minelle says—

Alcohol medication should be reserved for the treatment of general prostration and collapse, in the course of acute febrile diseases of children. Under the conditions, alcohol through an active stimulation of the central nervous system seems to exert a tonic effect upon the cardiovascular apparatus, with a strengthening action. The alcohol should always be given diluted and in small doses, stopping its use after the therapeutic effect has been accomplished.

German.

H. CURSCHMANN, *Der Unterleibs Typhus*, Monograph, Vienna, 1898, page 428—

"In spite of all theoretical objections, alcoholic agents are indispensable for the practitioner in the treatment of typhoid fever as well as in the treatment of acute febrile diseases in general. Personally, I would not care to treat typhoid fever patients at cer-

tain stages and in certain conditions, without the assistance of alcohol." The old prejudice against a fever-increasing effect of alcoholics has been definitely removed by the findings of Ziemssen, Turgensen, and Liebermeister. Although a theoretical explanation meets with difficulties, the stimulating effect of alcoholic agents upon the circulation and respiration has been positively established and from the practical viewpoint.

F. PENZOLDT, *Lehrbuch der Klinischen Arzneibehandlung*, 1921, page 127—

"Ethyl alcohol in the form of alcoholic beverages, under individualistic employment, constitutes an inestimably valuable remedy in the treatment of numerous, especially febrile diseases, more particularly in cases of heart failure. Alcohol was extensively used in former centuries, and is at present considered by the majority of physicians as an important adjuvant in the treatment of many diseases. Recently, voices have been raised to discredit this remedy, and based upon their laudable zeal to prevent the abuse of alcoholic beverages in general and to restrict an exaggerated therapeutic use of alcohol, some writers have gone so far as to question various curative properties, hitherto attributed to alcohol. The opposition is based too much on the partly incomplete and contradictory results of experimental investigation. Unprejudiced estimation of experiences at the bedside arrives at very different results. In the first place, it is very noteworthy that under appropriate employment—(a necessary condition for the use of any remedy)—*alcohol has never been known to cause visible damage.* Positive benefit, as shown by experience, is produced by alcohol. * * * According to Penzoldt's experience, the most extensive possible use of alcohol should be made, *unconditionally*, in grave cases of diphtheria, and septic infection, more particularly puerperal sepsis."

C. A. EWALD, *Der Alkohol Bei Infektions Krankheiten,* Mediz. Klinik, 1913, IX, page 1233—

Although Ewald is opposed to the use of alcohol in infectious diseases and also in pulmonary tuberculosis, he points out that the stimulating action of alcohol on the heart may apparently be utilized to advantage in grave cardiac collapse, of toxic as well as of mechanical character, due to hemorrhage.

M. GRUBER, *Der Einfluss des Alkohols auf den Verlauf der Infektionskrankheiten,* Wiener Klin. Wechschrift. 1901 XIV, page 479—

According to the judgment of experienced clinicians and careful observers, alcohol seems to have an excellent effect in certain diseased conditions, where it may be practically indispensable. Besides being indispensable in dyspepsia and in diabetes, alcohol is also considered as an indispensable analeptic agent in the treatment of collapse. *Professional experience has shown that large doses of alcohol may have a positively life-saving effect in cases of acute collapse.*

Alcohol in Nutrient Enemata.

FORCHHEIMER, F.—*The Prophylaxis and Treatment of Internal Diseases.* D. Appleton & Company, 1906.

Alcohol in Heart Diseases. Page 384.

Alcohol is a valuable remedy in heart affections; this is proved more by the results of actual experience than by those of experiment. In small doses it acts as a stimulant producing dilatation of the blood vessels; whether it directly affects the heart beneficially has not been conclusively decided, although it is more than likely that it does so. It is of service in those conditions of the heart that are due to infections; it may be used to counteract the vasoconstrictor

effects of digitalis. In the so-called senile heart, indeed in any of the cardiac affections of old people, it is practically indispensable.

Treatment of Ulcer of the Stomach. Page 277.

The best nutrient enema is the one first recommended by Leube, a mixture of scraped meat and chopped raw pancreas, with which occasionally a patient may be kept in good condition for a long time. Between the other methods there is very little choice; my preference is for peptonized milk, with or without eggs, to which I add 30 gm. or one ounce of brandy when a stimulating effect is required.

Alcohol a Specific Antidote in Acute Poisoning by Carbolic Acid. Page 588.

In the place of the sulphates alcohol may be used, either in the form of whiskey or as alcohol very slightly diluted. Two or four ounces may be given by mouth after the stomach has been emptied; *an additional amount may be injected into the bowel.* The alcohol may be repeated at intervals of one or two hours according to the demands of the case.

MATAS, R.—*Surgery of the Vascular System.* I Surgery of the Pericardium and the Heart. Keen's Surgery, Volume V, 1909, p. 17.

Post-operative treatment: Hypodermics of strychnine with digitalis of digaten, and small doses of morphine and atropin will do good, especially when combined with the cautious administration of black coffee, hot tea, champagne, and other forms of alcoholic stimulants of the kind that the patient is accustomed to. Treatment of hemorrhage. See page 197.

"These external measures are effectively assisted by hot stimulating solution injected slowly into the rec-

tum, strong black coffee being especially available and beneficial. The formula for post-operative shock, acute anemia, or exhaustion usually prescribed by myself is: Black coffee 8 ounces; panopepton 1 ounce; *brandy or whiskey* 1 ounce; tincture of digitalis 15 minims; laudanum 10 minims; to be administered slowly and repeated every two hours if the case still calls for it. *Champagne, whiskey, or brandy, which are as diffusible by rectum as by stomach, may be freely given by enema,* diluted with physiological salt solution or combined with other ingredients, when for any reason they cannot be taken by the normal route."

Further on, Dr. Matas says that when frequent stimulation is required to strengthen the flagging heart, *champagne, whiskey and brandy toddies,* and black coffee, may be given by mouth.

EUTIS, ALLEN, C., B. S., R. B., M. D., New Orleans. Assistant Demonstrator of Chemistry, Medical Department of Tulane University; Visiting Physician to Charity Hospital. New Orleans Med. and Surg. Jrl. 1904-1905, Vol. LVII, page 18—

"My own experience with nutrient enemata is confined to the post-operative treatment of twenty-three laparatonics performed by Dr. E. S. Lewis, assisted by Dr. T. T. Lemann and Dr. C. N. Chavigny, to whose service I was assigned at the time. All of these patients were nourished exclusively by nutrient enemata for from thirty-six to forty-eight hours, and in some cases for seventy-two hours. The enemata consisted of *brandy* ½ oz., Tr. Opii 5 minims, and peptonized milk, 4 oz. Occasionally the white of an egg was added. They were given every four hours, and to each alternate one were added eight ounces of normal salt solution. I was struck by the fact that with very

few exceptions those patients complained very little of thirst and of hunger, and we resorted to very little stimulation."

"Another case in which I used the same enemata was one of my own, in which there was a carcinoma of the pytorus very far advanced. The patient was a female fifty-two years of age, who was unable to retain anything by the mouth, but whom I was able to keep alive for three months by this method of alimentation."

WOOD, HORATIO C.—*Therapeutics, The Principles and Practice,* Tenth Edition, page 35.

Half a pint to a pint of milk with two or three eggs may be employed at each injection. When stimulants are required, half an ounce to an ounce of *brandy* may be added to each injection. The alcohol should always be added just before administration.

During the earlier stages of phthisis or consumption, alcohol taken with cod liver oil, or in small amounts with the food at meal times, conduces not so much to the comfort as to the well-being and recovery of the patient.

Administration: When a mild stimulant is wanted in the beginning of fevers, especially if milk punch seems too "heavy," wine whey may sometimes be used with advantage. It is made by pouring a *half-pint of sherry or madeira* into a pint of boiling milk, stirring thoroughly, and after coagulation has occurred, straining off the whey, which may or may not be sweetened, according to the taste of the patient. *Mulled wine* is often very grateful to patients as a change. It is made by beating an egg up thoroughly with three fluid ounces of *sherry* and adding a like quantity of water, which must be actually boiling when poured in. *Champagne* is useful in patients with delicate stomachs, especially if nausea or vomit-

ing actually exists, and also may be employed with advantage in sudden failure of the vital powers, especially in elderly persons. It must be very "dry," *i. e.*, as free as possible from sugar. Milk punch is prepared by adding from a dessert spoonful to a fluid ounce of brandy, whiskey, or rum, according to the degree of stimulation required, and the taste of the patient, to three fluid ounces of milk with sugar and nutmeg to taste.

Endocrinology and Metabolism.

Edited by
Lewellyn F. Barker

Associate Editors
R. G. Hoskins—Herman O. Mosenthal

D. Appleton & Co. 1922

Chapter on Artificial Feeding by Herbert S. Carter, p. 812—Rectal Feeding. Sample Formula.

Dextrose	20–50 gm
Alcohol	20–50 gm (cc)
Pancreatized milk	1000 cc
Salt	5–9 gm

This may be given in a 250 cc dose every 4-6 hours, and if well tolerated aids materially in helping the patient to tide over an emergency. By omitting the milk the solution is useful:

1. Simple exhaustion.
2. In Septic conditions.
3. As an antidote to chloroform; in phosphorus poisoning; or anything that causes fatty degeneration of the liver, *e. g.*, toxaemia of pregnancy and in diabetic acidosis and acetonaemia.

4. After abdominal operations, especially in undernourished or dessicated individuals.

(Above represents 1 1-3 to 3 1-3 oz. of whiskey daily by rectum in 24 hours.)

C. S. BACON:

In pernicious vomiting of pregnancy:

Glucose	50 gm
Alcohol	50 cc
(Salts, etc.)	
Distilled water to 1000 cc.	

From 300 to 500 cc of mixture three times a day.

Journal American Medical Association, June 8, 1918, p. 1750.

Resolutions of House of Delegates of American Medical Association.

The American Medical Association, composed of approximately 90,000 members, is the most influential medical association in the United States. Its official body is the House of Delegates.

In the American Medical Association bulletin of the issue of October 19, 1924, at page 240, appears the following resolutions of the House of Delegates, passed at the seventy-fifth annual session of the American Medical Association, held at Chicago, June 9-13, 1924:

"National Prohibition Acts and Rulings.

"Resolutions expressing disapproval of certain sections of the National Prohibition Acts were adopted as follows:

"WHEREAS, The use of alcohol in medicine by physicians is limited, regardless of the condition of the patient, by the National Prohibition Acts; and

"WHEREAS, The confidential relation maintained between the physician and his patient is violated by the said National Prohibition Acts; and

"WHEREAS, The interests of the patient and the success of the physician require that such medicinal alcoholic liquor as prescribed in the treatment of disease be of known purity and alcoholic content; and

"WHEREAS, This can be accomplished only by the marketing of bottled in bond alcohol for medicinal purposes in containers suitable for dispensing, unopened, by the pharmacists in such sizes as will meet the patient's needs; be it

"RESOLVED, That the House of Delegates of the American Medical Association expresses its disapproval of those portions of the National Prohibition Acts which interfere with the proper relation between the physician and his patient in prescribing alcohol medicinally; be it further

"RESOLVED, That the House of Delegates of the American Medical Association instruct the Board of Trustees to use its best endeavor to have repealed such sections of the National Prohibition Acts as are in conflict with the above resolutions and also to use their best endeavor to have the Commissioner of Internal Revenue and the Prohibition Commissioner issue revised instruction on the use of the prescribing of alcoholic liquors for medicinal purposes by physicians."

These resolutions were adopted by the House of Delegates of the American Medical Association without a dissenting vote, as appears by the Journal of the American Medical Association in the issue of June 21, 1924, at page 2056.

Whiskey, at the present time, is included in the United States Pharmacopeia.

The Resolution adopted by the American Medical Association in 1924, after a full and fair trial of the restrictions imposed upon the National Prohibition Act and favoring their repeal, abrogated and superseded the Resolution of 1917, referred to in the opinion of the United States Circuit Court of Appeals for the Second Circuit.

In 1925, even more elaborate Resolutions were adopted by the House of Delegates of the American Medical Association, and of the New York State Medical Association, respectively. These Resolutions are in the following form.

The 1924 Resolution was adopted as follows:

> "RESOLVED, That the House of Delegates of the American Medical Association expresses its disapproval of those portions of the National Prohibition Acts which interfere with the proper relation between the physician and his patient in prescribing alcohol medicinally; be it further
>
> "RESOLVED, That the House of Delegates of the American Medical Association, instruct the Board of Trustees to use its best endeavor to have repealed such sections of the National Prohibition Acts as are in conflict with the above resolution and also use their best endeavor to have the Commissioner of Internal Revenue and the Prohibition Commissioner issue revised instruction on the use of the prescribing of alcoholic liquors for medicinal purposes by physicians."

The 1925 Resolutions adopted both by the House of Delegates of the American Medical Association, and of the New York State Medical Association are as follows:

> "WHEREAS, Certain provisions of the Volstead Act and acts amendatory thereto prohibit, without exception or qualification, physicians from prescribing more than one pint of spirituous liquor to any patient in ten days; and

"WHEREAS, At a meeting of the House of Delegates of the American Medical Association resolutions were adopted condemnatory of such provisions, and advocating a change in the law and the adoption of proper regulations by the Prohibition Department and the Internal Revenue Commissioner; and

"WHEREAS, At the time of the passage of the Volstead Act, regulations, as distinguished from prohibitions, could have adequately dealt with the subject and yet have left unimpaired the rights and obligations of physicians to prescribe spirituous liquor for their patients when in their best judgment required, and at the same time have prevented the unworthy practitioner from prescribing liquors for beverage purposes under the guise of legitimate prescriptions; and

"WHEREAS, Regulations to that end could still be formulated and promulgated in case such provisions of the said acts be declared unconstitutional, and should be prepared without further delay; and

"WHEREAS, The present prohibitions have operated mainly to prevent large numbers of physicians of standing and professional integrity from prescribing for their patients in accordance with their best judgment as to their patients' necessities, while the unlawful acts of the unworthy practitioner have been promoted; and that further effect of such prohibitions has been that liquor of standard quality, necessary for medicinal prescription purposes, has largely become unprocurable, it is hereby

"RESOLVED, In view of the fact that such portions of the Volstead Act and the Amendatory Acts may be declared unconstitutional, that, as a substitute therefor, regulations should be forthwith drafted by the Prohibition Department to the end that the present abuses may be abated, and existing prohibitions as to

the practice of medicine removed; and that this Association use all means within its power looking to the preliminary approval of such regulations by the Prohibition Department and the Commissioner of Internal Revenue; and be it further

"RESOLVED, That the Board of Trustees be directed to appoint a committee to cooperate with the Commissioner of the Internal Revenue and the Secretary of the Treasury in the formulation of such regulations as under the National Prohibition Act, as amended, as may be necessary to carry said act into effect, so far as the medicinal use of liquor is concerned" (46, 47).

ILLUSTRATIVE CHART OF COMPARATIVE AMOUNTS OF ALCOHOL REQUIRED PER DAY IN VARIOUS DISEASES ACCORDING TO EMINENT AMERICAN, ENGLISH AND GERMAN AUTHORITIES* AND THE MAXIMUM ALLOWANCE UNDER THE VOLSTEAD ACT.

Disease	Amount required per day	Authority	Maximum allowance per day under Volstead Act
Diphtheria Septic	1-1½ pts of whisky for children 4 oz. of brandy 24-36 oz. champagne	A. Jacobi E. W. Goodall	13/5 oz. whisky 3 oz.champagne
Typhoid Fever	6-12 oz. whisky	J. M. Anders James Tyson	1 3/5 oz.
Typhus Fever	6-12 oz. whisky	James Tyson	1 3/5 oz.
Pneumonia	2-5-10 oz. brandy	Arthur Latham	1 3/5 oz.
Sepsis	"most extensive possible use of alcohol"	F. Penzoldt	1 3/5 oz.
Rectal Alimentation	1 1/3-3 1/3 oz. whisky	H. S. Carter	1 3/5 oz.

* For references see foregoing authorities.

Supreme Court of the United States

OCTOBER TERM, 1925

No. ~~201~~ 47

SAMUEL W. LAMBERT

Appellant

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; DAVID H. BLAIR, as Commissioner of Internal Revenue, and EMORY R. BUCKNER, as United States Attorney for the Southern District of New York

Appellees

APPELLANT'S REPLY BRIEF

JOSEPH S. AUERBACH
Attorney for Appellant

JOSEPH S. AUERBACH
MARTIN A. SCHENCK
EMILY C. HOLT
Of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

SAMUEL W. LAMBERT, Appellant, v. EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; DAVID H. BLAIR, as Commissioner of Internal Revenue, and EMORY R. BUCKNER, as United States Attorney for the Southern District of New York, Appellees.	No. 301.

APPELLANT'S REPLY BRIEF.

POINT I.

The question presented by this appeal is new and has not been before determined by this Court.

The Circuit Court of Appeals, at folio 48, stated that the real question in this case is "the validity of the prohibition acts as they affect the right of a medical practitioner to prescribe spirituous or vinous liquors in the treatment of diseases." The Court held that this was a new question (fol. 51). The case presents the right of a medical practitioner to prescribe, and the right of his patient to receive, medicine in accordance with fair medi-

cal practice and in accordance with the judgment of the physician that such medicine is necessary for the cure of the patient from some known ailment. Generally stated, the case directly presents the question as to whether a health statute can impair the health of the individual because of matters involving convenience of enforcement.

The Government's brief urges, as does the brief submitted on behalf of Messrs. Wheeler and Dunford, as *amici curiae*, that the questions presented by this appeal have before been determined by this Court. The Government's brief further alleges that Dr. Lambert submitted a brief as *amicus curiae* in the case of *Everard Breweries* v. *Day*, 265 U. S., 545; that his present arguments were submitted to this Court in that case, and that the determination of this Court thereon constitutes his answer. The brief of Dr. Lambert, however, was submitted as *amicus curiae* in *Everard Breweries* v. *Day* with the express purpose of drawing a distinction between that case and the case at bar, and in an effort to preserve the question in the case at bar from a prior decision therein. The question, we respectfully submit, has been thus preserved. This Court therein drew a distinction between the manner in which malt liquor was treated by Congress from the manner in which spirituous liquor was treated in the present instance. The very recognition of prescription in the one case was made the basis for the prohibition of prescription in the other.

Furthermore, the case of *Everard Breweries* v. *Day* presented the constitutional question from the standpoint of a manufacturer. Whatever incidental right to practise medicine might be said to have been involved was purely from that remoteness. No physician came before the Court, sustained under fair medical practice and with his trained professional judgment conceded by the Gov-

ernment under the assertion of necessity of prescription as distinguished from mere usefulness or convenience.

As Mr. Justice Holmes said in *Quong Wing* v. *Kirkendall*, 223 U. S., 59, at 64:

> "Laws frequently are enforced which the Court recognizes as possibly or probably invalid if attacked by a different interest or in a different way." (Quoted and reaffirmed by Mr. Justice Butler in *Weaver* v. *Palmer Bros. Co.*, decided March 8, 1926, U. S. Advance Op. No. 10, p. 366, at 369.)

POINT II.

The two elements decisive in this case have recently been determined in this Court in favor of appellant's contentions.

The brief for the Government, and also the brief of Messrs. Wheeler and Dunford as *amici curiae*, discuss the subject as if it fell under ordinary implied enforcement powers of Congress. Many decisions applying general and somewhat varying measures of appropriateness and reasonableness are in this connection referred to by them. But the subject is not so broad. In the specific situation presented this Court has formulated a more definite rule.

(a) *Direct control of medical practice in the States is beyond the power of the Federal Government.*

In *Linder* v. *United States*, 268 U. S., 5, this Court, at page 18, said:

> "Obviously, direct control of medical practice in the States is beyond the power of the Federal Government."

(b) *Where the subject is beyond the control of Congress, it does not yield to mere convenience in the enforcement of other powers.*

In *Schlesinger* v. *Wisconsin* (decided March 1, 1926, U. S. Supreme Court Advance Opinions No. 9, p. 301), this Court, per Mr. Justice McReynolds, at page 303, said:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the Legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an enactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. *Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity.*"

In the case at bar, when "A" is ill, and for his cure concededly requires, in accordance with fair medical practice and in accordance with his physician's trained judgment, more than a pint of spirituous liquor within ten days for his cure, it is contended that Congress (although the subject is within the control of the States) may injure "A" and deprive him of that medicine if it seems necessary in order to enable the Federal Government to enforce a health statute against "B." The principle so clearly stated by Mr. Justice McReynolds in regard to the taxing power would seem to be peculiarly applicable to health legislation. The life and health of "A" should not be destroyed or impaired in order to enforce the statute against "B." *"Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity."*

This, which is really the determining rule in the case at bar, was reaffirmed by this Court per Mr. Justice Butler in *Weaver* v. *Palmer Bros. Company* (decided March 8, 1926, U. S. Supreme Court Court Advance Opinions No.

10, p. 366), wherein a statute of Pennsylvania prohibiting the use of shoddy in the manufacture of mattresses was held unconstitutional. The facts establishing the arbitrariness and unreasonableness of the Legislature in its prohibition, as distinguished from its regulation in the matter, were before this Court on evidence and on judicial notice, as they are before this Court in the case at bar on judicial notice and on the admissions of the Government of the allegations of the complaint. It was claimed in defense of the legislation that it was a necessary enforcement feature in the prevention of deception and in the protection of health. This Court held that regulations rather than prohibitions obviously could be effectively applied; and, at page 369, said:

> "Constitutional guarantees may not be made to yield to mere convenience. *Schlesinger* v. *Wisconsin*, decided March 1, 1926, U. S. . The business here involved is legitimate and useful; and while it is subject to reasonable regulation, the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the fourteenth amendment."

POINT III.

The legislative experience of the several states in regard to medical prescription of liquor is no justification for the control of medicine in this respect by Congress.

The Government argues that Congress, in prohibiting more than one pint of spirituous liquor in ten days, must have investigated the necessity of such prohibition, because it must have had before it the experience of the

several States upon the subject. The argument cuts another way. If the experience of the States was clear on the subject of medical practice, it is significant that the Eighteenth Amendment, using the term "beverage purpose" (as distinguished from medical use), delegated no power to Congress on the subject. The presumption is thus strengthened that the intent was for the States to continue to deal with medical practice in this respect, and that it remained a matter wholly within their control and beyond Federal control.

POINT IV.

The provisions of the statute complained of, prohibiting more than one pint of spirituous liquor in ten days, are no less prohibitions of medicine because legislative (as distinguished from medical) substitutes are allowed.

The complainant alleges, and the Government admits, that it is the belief and judgment of the complainant, based upon his experience and observations in the study of medical science,

> "that the use as a medicine of *spirituous liquors* to be taken internally is, in certain cases, *necessary* for the proper treatment of patients, in order to afford relief from known ailments. By spirituous liquors, complainant means liquors containing more than one-half of one per cent. of alcohol by volume, including brandy, whisky and wine" (Complaint, Paragraph Eighth, fol. 7).

The complainant alleges, and the Government admits, that it is the belief of the complainant, based upon his experience and observations in the study of medical science,

> "that in the use of *spirituous liquors* as medicine, it is, in certain cases, including cases now under complainant's observations and subject to his professional advice, it is *necessary*, in order to afford relief from known ailments, that the patients should use internally more than one pint of *such liquor* in ten days, and that it is, in certain cases, *necessary* for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding that within a preceding period of less than ten days the patient may have received and used more than one pint of *such liquor*" (Complaint, Paragraph Ninth, fol. 7).

Congress has conceded (and the Government admits) the therapeutic use of alcoholic liquor. But it is the main contention of the Government in support of the reasonableness of prohibition that other medicines may be used as substitutes provided they be either patent medicines (and thus of a content unknown to the prescribing physician), or provided the physician himself adds drugs to them so as to make them distasteful to the patient. The extent of this distaste, and whether it must proceed to the extent of pain or injury, or, in the case of the delicate, to the extent that the system may not retain the medicine, is not stated. We shall not discuss the reasonableness of the claimed substitutes; nor shall we attack or defend the reasonableness of Congress in prohibiting a reputable physician from following his trained opinion and in attempting to compel him to follow the secret formulæ of quacks. Neither is it to the point that all of these claimed substitutes are confessed expedients in evasion of the statute itself. *Price* v. *Russell*, 296 F. 263, 267. The complaint of Dr. Lambert is to the *necessity* of the prescription of *spirituous liquor* in excess of the pint per ten days. That

necessity, admitted herein by the Government, is predicated upon the *inadequacy of any substitute whatsoever*, whether patent medicine, secretly manufactured by quacks, or mixtures of alcohol and drugs to be compounded by Dr. Lambert himself.

It would seem that the unreasonableness of the prohibition under these circumstances is emphasized by not only the unreasonableness of claiming substitutes, but by the unreasonableness of the substitutes themselves. If a physician may be trusted to compound an unpalatable mixture for a dying man, he should be trusted to give him a medicine calculated for his cure.

Even if, as urged upon the Government's brief at page 8, there were no limit placed upon the amount of liquor which a physician may prescribe for a patient who is in a hospital, the unreasonableness of the legislation would be emphasized rather than extenuated. Hospitals are not universally available nor are the sick in all circumstances in a condition of health for transfer to or in a financial condition for maintenance in a hospital. But the Government's claim is mistaken. Section 6 of Title II, N. P. A., makes no general exception in favor of a hospital but only of a hospital or sanatorium *engaged in the treatment of persons suffering from alcoholism.*"

Respectfully submitted,

JOSEPH S. AUERBACH,
Attorney for Appellant.

JOSEPH S. AUERBACH,
MARTIN A. SCHENCK,
EMILY C. HOLT,
Of Counsel.

No. 30-47

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Supreme Court of the United States

OCTOBER TERM, 1925.

SAMUEL W. LAMBERT,
Appellant.

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director, DAVID H. BLAIR, as Commissioner of Internal Revenue, and EMORY R. BUCKNER, as United States Attorney for the Southern District of New York,
Respondents.

BRIEF OF AMERICAN MEDICAL ASSOCIATION AS *AMICUS CURIAE*.

WILLIAM C. WOODWARD,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES,

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SAMUEL W. LAMBERT,
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EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director, DAVID H. BLAIR, as Commissioner of Internal Revenue and EMORY R. BUCKNER, as United States Attorney for the Southern District of New York,
Respondents.

No. 301.

BRIEF OF AMERICAN MEDICAL ASSOCIATION AS AMICUS CURIAE.

STATUS OF AMERICAN MEDICAL ASSOCIATION IN THIS CONTROVERSY.

The appellant, Samuel W. Lambert, is a member of the American Medical Association. Although he brings this appeal in his individual capacity, the Court's decision will affect the rights of every member of the Association. Moreover, the American Medical Association became additionally interested in this case when the court below based its decision in part on a resolution adopted by the House of Delegates of the American Medical Association in 1917, setting forth that resolution at length in connection with its opinion (*Lambert* v.

Yellowley, 4 Fed. (2d) 915, at p. 921). The American Medical Association has asked and obtained leave of court to submit this brief. If in some places this brief seems to speak on behalf of the patient rather than the physician, it is because the interests of the patient and the interests of the physician are inseparable. The Association craves the indulgence of the Court, therefore, if at times the interests of the patient be too prominently discussed. He is after all the chief sufferer if any wrong has been done by the legislation here complained of.

The Association, therefore, welcomes the opportunity to urge upon the Court that section 7 of the National Prohibition Act and the corresponding section of the Willis-Campbell Act, under the rule laid down by this Court, fail to conform to the test of reasonableness and lack of arbitrariness, and are accordingly unconstitutional.

The American Medical Association is a federacy of 53 State and Territorial Medical Associations, including associations in the Canal Zone, the Philippine Islands, and Porto Rico. Membership in any such association carries with it membership in the American Medical Association. Active membership is limited to physicians authorized by law to practice medicine. The American Medical Association was organized in 1847. It is now incorporated under the Laws of the State of Illinois. Its objects are to promote the science and art of medicine and the betterment of public health. Its representative character is to be found in the fact that out of 150,000 physicians licensed to practice medicine in the United States and to practice as commissioned officers in the Army, Navy, and Public Health Service, 91,000 are members of the Association.

Grievances from which Physicians Seek Relief.

The National Prohibition Act and the Act supplemental thereto impose certain prohibitions on physicians that are not imposed on other persons, having reference solely to the medicinal use of liquor. These prohibitions deny to the physician the right to follow his calling according to his best professional judgment and according to his conscience. They discriminate against the use of liquor for medicinal purposes as compared with its use for sacramental and industrial purposes. They are believed to be arbitrary and unreasonable, and therefore, unconstitutional and void. The prohibitions complained of are as follows:

> 1. No physician may prescribe more than one pint of spirituous liquor to be used by a patient within any period of ten days. Section 7, Title II, National Prohibition Act, 41 Stat. 305.
>
> 2. No physician may prescribe any vinous liquor that contains more than 24% of alcohol by volume, nor prescribe more than one quarter of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than a half-pint of alcohol, for use by any person within any period of ten days. Section 2, Act Supplemental to National Prohibition Act, 42 Stat. 222.

Attitude of American Medical Association with Respect to Medicinal Use of Liquor.

It would be unnecessary to define the position of the American Medical Association with respect to the medicinal use of liquor, had not the matter been made material in the Court below. The Court said:

> "The fact may also be noted that whether or not whiskey, wine or beer has a therapeutic value in the treatment of disease is a very much disputed question in the medical profession. *In the year 1917 the American Medical Association, which has a membership of 150,000 physicians, passed a resolution discouraging the use of alcohol as a therapeutic agent, which resolution is in the margin.*"
>
> *Lambert* v. *Yellowley*, 4 F. (2d) 915, at page 921.

The resolution set forth in the margin reads as follows:

> "Whereas, we believe that the use of alcohol as a beverage is detrimental to human economy, and
>
> "Whereas, its use in therapeutics, as a tonic or as a stimulant or as a food has no scientific basis, therefore, be it
>
> "Resolved, that the American Medical Association opposes the use of alcohol as a beverage, and be it further
>
> "Resolved, that the use of alcohol as a therapeutic agent should be discouraged."

It is unfortunate that the resolution adopted by the American Medical Association in 1917 should have been used by the Court below as one of the circumstances on which to base its decision and should have been deemed of even sufficient moment to incorporate in its opinion. That resolution was impliedly repudiated in 1921 and 1922, and was at least hardly in harmony with the resolution adopted by the Association in 1924. But at most the resolution of 1917, on which the court relied, does not deny the therapeutic value of alcohol. It denies merely that its therapeutic use has a *scientific* basis. As to the empirical basis, the resolution is silent. The resolution merely "discourages" the use of alcohol—apparently

because of the then absence of a *scientific* basis for it—but this is not a denial of any therapeutic need for it whatsoever. The little importance attached to the resolution by the American Medical Association itself is shown by the fact that at the very time it was adopted the Association was including alcohol in its "Handbook of Useful Drugs," issued by its Council on Pharmacy and Chemistry, and notwithstanding the resolution it continued to include alcohol in that list. The sixth edition, 1923, says:

> "Internally, alcohol is a narcotic; excessive doses depress and paralyze the central nervous system. Small doses produce euphoria, stimulate respiration, moderately dilate the cutaneous and splanchnic vessels and modify the circulation. It is burned in the body and thus serves to a restricted extent as a source of energy.
>
> "Alcohol is employed as a diffusible stimulant, diaphoretic and hypnotic. In well-selected cases, especially in patients accustomed to its use, it may be very valuable; otherwise it is apt to do more harm than good. In practice it is usually administered in the form of whiskey, brandy, wine or other alcohol-containing beverages." (*Useful Drugs*, 6th ed., 1923, p. 21.)

Any possible force attached to the resolution of 1917 originally seems to have been lost in 1921, when the House of Delegates refused to reaffirm the judgment expressed in it. *Proceedings, House of Delegates, A. M. A.*, 1921, p. 42. And in 1922, the Council on Scientific Assembly, to which the matter of reaffirming that judgment had been referred, reported:

> "The Council deems it unwise to attempt to determine moot, scientific questions by resolution or by vote and recommends that the House of Delegates shall take no action at this time on the question of the therapeutic value of alcohol."
>
> *Proceedings, House of Delegates, A. M. A.*, 1922, p. 34."

And accordingly the House took no action. The House had been asked to reiterate and reaffirm the judgment expressed in its resolution of 1917. It refused to do so. It thereby impliedly repudiated that judgment.

Inasmuch as the court below laid so much stress on the attitude of the American Medical Association with respect to this matter, it seems proper that this Court should be informed as to that attitude as set forth in resolutions adopted in 1924 and 1925. These resolutions are as follows:

Resolution adopted in 1924.

"Resolved, that the House of Delegates of the American Medical Association expresses its disapproval of those portions of the National Prohibition Acts which interfere with the proper relation between the physician and his patient in prescribing alcohol medicinally; be it further

"Resolved, that the House of Delegates of the American Medical Association instruct the Board of Trustees to use its best endeavor to have repealed such sections of the National Prohibition Acts as are in conflict with the above resolution and also use their best endeavor to have the Commissioner of Internal Revenue and the Prohibition Commissioner issue revised instruction on the use of the prescribing of alcoholic liquors for medicinal purposes by physicians."

Proceedings, House of Delegates, A. M. A., 1924, page 37.

Resolution adopted in 1925.

"Resolved, in view of the fact that such portions of the Volstead Act and the amendatory acts may be declared unconstitutional, that, as a substitute therefor, regulations should be forthwith drafted by the Prohibition Department to the end that the present abuses may be abated, and existing prohibitions as to the practice of medicine removed; and that this Association use all means

within its power looking to the preliminary approval of such regulations by the Prohibition Department and the Commissioner of Internal Revenue; and be it further

"Resolved, that the Board of Trustees be directed to appoint a committee to cooperate with the Commissioner of Internal Revenue and the Secretary of the Treasury in the formulation of such regulations as under the National Prohibition Act, as amended, as may be necessary to carry said Act into effect, so far as the medicinal use of liquor is concerned."

Proceedings, House of Delegates, A. M. A., 1925, pp. 34-35.

Pursuant to the resolution last set forth, the Board of Trustees appointed a committee to formulate the proposed regulations, and those regulations, duly approved by the Board of Trustees, have been submitted to the Treasury Department. They are as follows:

1. That the following regulations be approved by the Board of Trustees to govern the prescribing and dispensing of liquor in event the quantitative limitations under the National Prohibition Act as amended be declared unconstitutional by the U. S. Supreme Court:

a. Any physician prescribing more than one pint of liquor in thirty days to the same patient shall issue a certificate to accompany said prescription and be necessary to its validity, that the excess prescribed for is in the judgment of the prescribing physician a medical necessity; and the prescribing physician shall forthwith mail or deliver a copy of said certificate to the prohibition administrator of the district in which said prescription is to be filled.

b. That any person to whom a pharmacist delivers liquor called for by any prescription be re-

quired by the pharmacist to pledge himself in writing on the prescription blank, that in so far as lies in his power to prevent it, no part of any such liquor will be used for other than lawful medicinal purposes.

The Medicinal Value of Liquor is not Called into Question in this Case, nor is it Material.

It is conceived that the value of liquor as a medicinal agent is not debatable in this case. The case arises under the National Prohibition Act and an Act supplemental thereto. Those Acts both concede the value of liquor as a medicinal agent when they specifically permit and regulate its use.

Dosage.

The problem of dosage is that of getting the needed medicine into the tissues of the patient through the circulating blood and keeping it there in sufficient quantities for a sufficient time to produce the desired result. This depends on the power of the body to absorb, assimilate and react to, and excrete the medicine. Obviously, these conditions are not subject to control by any act of Congress or even by any constitutional amendment. If it be deemed necessary to limit by law the dosage of any lawful medicine such limitation should be made with due regard to the welfare of the sick as well as the welfare of the rest of the community. The limitations on dosage of which complaint is now made seem to be defective in this respect. They seem to have no foundation in scientific observation or in experience as will be explained at length later. They are, it is believed arbitrary and unreasonable.

The Maximum Statutory Doses of Liquor Allowed by Law, of which Complaint is Made, Have no Relation to the Medical Needs of the Sick.

The National Prohibition Act and the act supplemental thereto limit the quantity of liquor that may be used medicinally. They provide that (1) in any ten-day period, (2) not more than one pint of spirituous liquor, nor more than one quart of vinous liquor, nor any combination of these containing more than one-half pint of alcohol, shall be administered (3) to any one patient. The Commissioner of Internal Revenue construes the limits to cover all alcohol to be used for internal *and external* use. (Section 1403, Regulation 60, relative to intoxicating liquor, promulgated by the Commissioner of Internal Revenue, March 14, 1924.) These limits apply to all alcohol intended for medicinal use internally, unless it is medicated so as to render it impracticable to use it for beverage purposes; that is, the limits cannot be evaded by prescribing some medicated compound of alcohol, wine, whiskey or brandy, since the drug used for medicating it might work disaster to the patient. So strict are the quantitative limitations that no provision is made even whereby a patient whose lawfully prescribed medicinal liquor is lost through accident, theft or unauthorized consumption by some other person, without fault on the part of the patient, can replace the needed medicine. A minister whose sacramental wine is lost or stolen, or a manufacturer whose industrial alcohol disappears, without fault on his part, can, in the discretion of the Commissioner of Internal Revenue, obtain a new supply. The sick man whose medicinal liquor disappears without fault on his part can obtain no more; for the law vests in no one the right to authorize him to

obtain medicinal liquor in excess of the statutory quantities.

The only person to whom the law allows liquor in excess of the quantities stated is the patient who is suffering from alcoholism. The law authorizes him to obtain any quantity, *in an inebriate asylum*. Section 6, Title II, National Prohibition Act.

A Ten-Day Period as a Unit for Determining the Dosage of Liquor Has No Relation to Any Fact or Principle of Physiology, Pathology or Therapeutics, and Is Purely Arbitrary.

A ten-day period corresponds to no known cycle in the human economy. In the practice of medicine, dosages are not fixed on the basis of ten-day periods. In cases in which cumulative effects may occur, as in case of the administration of compounds of mercury, a considerable period of time may be recognized, in determining duration of administration; but alcohol is too rapidly absorbed and burned up in the tissues, or excreted, to come within the class of drugs having a cumulative action. Of a therapeutic dose only traces remain in the blood twenty-four hours after administration. According to Cushny:

> "Alcohol is absorbed rapidly, about twenty per cent. of that ingested being taken up in the stomach and eighty per cent. in the small intestine * * *. Traces remain in the blood for about twenty-four hours, but over ninety-five per cent. of that ingested is oxidized in that time." (*A Text Book on Pharmacology and Therapeutics*, by *Arthur R. Cushny*, 1924, p. 187).

Other teachers and writers might be cited to the same point.

In view of the fleeting character of the action of alcohol, it is impracticable for a physician, at the beginning

of any ten-day period, to look ahead and to determine what the needs of his patient will be throughout the coming ten days. It is impracticable, therefore, for a physician, having a pint of liquor at his command, and no lawful way of obtaining more, to know how to distribute that quantity to the best interest of his patient. If he distributes the entire amount evenly throughout the ten-day period, he may at no time get the therapeutic effect desired. If the physician withhold in the beginning the dose of liquor he knows the patient needs, for fear of having greater need later, he may do his patient an injury. If in the beginning of the ten-day period he draws on his statutory allowance of liquor regardless of future needs, a crisis in the latter part of the period may turn the scales against his patient.

If the quantity of liquor allowed by law was the maximum quantity that might be required by any patient, the ten-day period would be immaterial. But it is not. In fact, the statutory allowance does not even approach the amount recommended by reputable medical writers, as appears below.

The Maximum Dosage of Liquor Allowed by Law Has No Relation to Ordinary Standards of Dosage Based on Study, Observation and Experience, and Is Purely Arbitrary.

Liquor has been and is prescribed for so many purposes, to persons of such varied ages and habits, suffering from varied ailments, and under such varied conditions, that a statement of exact dosage seems impossible. Dosage in any case is based on medical observation and experience. If it has proved impossible for the medical profession after years of investigation, study, observation and experience, to lay down any hard and fast dosages how clearly impossible it is for any legislative body

to do so. In the present instance, too, a legislative body professing no expert knowledge seems to have attempted to lay down rules for dosage without, so far as the record shows, even seeking such knowledge through consultations with experts.

The one-pint limit on liquor seems to have been translated bodily into the National Prohibition Act from a revenue act; as if any standard suitable for revenue officers in the collection of taxes was necessarily a proper guide for physicians in the treatment of the sick. Even in the revenue law, however, the ten-day limit did not apply. Where it came from, no one seems to know. The limits placed on the amounts of vinous liquor and of alcohol by the Supplemental Act are manifestly based on the earlier standard fixed with respect to spirituous liquor.

One pint of liquor is equivalent to sixteen fluid ounces. As prescribed in the household, its equivalent is thirty-two tablespoonfuls. If this be distributed evenly over any ten-day period, the patient cannot have more than 3.2 tablespoonfuls a day, or, approximately, one tablespoonful three times a day. If the dose be increased at any time, the patient must get less at some other time, or maybe go altogether without it. If any alcohol is used for external application, the amount available for internal use is correspondingly diminished. As contrasted with the statutory limit, averaging 3.2 tablespoonfuls of spirituous liquor a day, or equivalent amounts of alcohol or vinous liquor, the doses recommended by disinterested medical writers of repute tell their own story. Some such doses are set forth below. The sources from which the dosages stated are drawn, and the qualifications of those who are quoted to speak on the subject, are stated in Exhibit "A", appended. Other writers might be cited to the same effect.

Benedict, in 1925, stated that about two and a half ounces of alcohol can be oxidized in the human body

daily, replacing other nutrients in the diet. Administered in the amount stated, the statutory ten-day allowance of alcohol will be exhausted in less than four days.

Cushny, in 1924, stated that alcohol may be given in the treatment of diabetes in quantities corresponding to one-sixth to one-third of an ounce of absolute alcohol every hour. If one-sixth of an ounce be given every hour for fifteen hours a day, the statutory ten-day allowance will be exhausted in about three days.

Francis Hare, in 1924, recommended that in the treatment of acute alcoholism, to avoid precipitating an attack of delirium tremens the amount of alcohol previously used by the patient be reduced at the rate of two ounces every twenty-four hours. If a patient has been taking more than a pint of whisky a day, this treatment could not be continued for more than one day, unless the patient could enter an inebriate asylum.

Sollmann, in 1922, stated the ordinary beginning dose of brandy as from one-fourth to one ounce every three hours, increasing the frequency as needed. Six one-ounce doses a day would exhaust the statutory ten-day allowance in less than three days.

Savill, in 1922, recommended doses of from four to twelve ounces of whisky in twenty-four hours in alcoholic patients suffering from pneumonia. Such doses, under the National Prohibition Act would carry the patient for from about one day to four days.

Hobart Amory Hare, in 1918, recommended whisky or brandy in doses of from one-half to two ounces every three or four hours, saying, "More than a pint in twenty-four hours is rarely required, but this amount often does great good and is not excessive if the patient is accustomed to its use and needs supporting treatment."

Vincent and Muratet, in 1918, reported that in France the average dose of alcohol is approximately three or four ounces in twenty-four hours.

Shattuck, in 1914, said that in typhoid fever three or four ounces of whisky need rarely be exceeded in twenty-four hours.

Elsner, in 1914, recommended in the treatment of lobar pneumonia Tokay wine in one-half ounce doses every half hour. Twenty half-ounce doses a day would exhaust in about three days the quart of wine allowed by law for a ten-day period.

Osler, in 1912, recommended in lobar pneumonia the use of from four to twelve ounces of whisky in twenty-four hours.

Purves Stewart, in 1912, in discussing the treatment of acute alcoholism said that in the case of a patient taking a bottle of whisky, equivalent to twenty-five fluid ounces, daily, it was advisable to cut the amount down by about four or five ounces daily. Such a patient, under the National Prohibition Act, could not get a supply to last him one day, unless he was so situated geographically and financially as to be able to enter an inebriate asylum.

Macdonald, in 1909, stated the reasonable daily range of the dose of alcohol as from six to nine ounces.

A comparison of the dosages stated above with the dosages allowed under the National Prohibition Act shows the inconsistency of the Act. The Act purports to allow the use of alcohol for medicinal purposes, but then denies the right to use it in doses that to many competent physicians seem adequate. It allows the use of the remedy, thereby acknowledging its necessity, but denies the right to use it in effective doses. The law in this respect may be aptly characterized—as it was characterized by Judge Bourquin with respect to its limits on the number of prescriptions a physician may issue within a given period, *U. S.* v. *Freund,* 290 Fed. 411,—as "an unreasonable mandate to malpractice."

Any Dosage Fixed on the Basis of Any One "Person" Without Regard to Age, Size, Habits, Physical Condition, and State of Health Is Arbitrary and Unreasonable.

Medical text-books and other medical literature commonly state the doses of medicinal agents as average doses, and this average dose is merely suggestive. The physician fixes his initial dose according to the age, size, habits and physical condition of the patient, and then increases or decreases the dose until he obtains the desired result. Since the enactment of the National Prohibition Act and the Supplemental Act, however, he may prescribe liquor and increase the dose in the hope of obtaining some desired therapeutic results; but when he has reached his statutory maximum dose he must abandon his effort. If the result has not been obtained, so much the worse for the patient.

One pint of liquor in ten days, for internal and external use must, under the statutes, suffice for a weakling; not one drop more is available for a two-hundred-pound adult.

Any person suffering from a "cold" may lawfully be given a pint of whiskey in ten days, or in one day, for that matter, if the physician thinks it necessary; the same person, suffering from pneumonia, can have one pint, and one pint only, no matter what the physician or a dozen physicians think. Congress has prescribed the dose.

A ninety-pound woman who has been a total abstainer all her life, who has pneumonia, can be given one pint of whiskey in ten days; a husky dock laborer, weighing 250 pounds and accustomed to liquor, can have not one drop more, even though delirium tremens result from the withdrawal of his customary allowance of alcohol.

Argument seems hardly necessary to show that any statutory system of dosage that creates such situations is arbitrary and unreasonable, but specific evidence of the arbitrary and unreasonable character of the statutory dosage can be found in the law itself; for the law admits that inebriates undergoing treatment may need more liquor than the normal statutory dosage. Then, curiously enough, the law says that even inebriates may have the necessary excess allowance only on conditions that are open to but few. An inebriate who can enter a *bona fide* hospital or sanitorium engaged in the treatment of persons suffering from alcoholism can have alcohol without reference to statutory dosage. If he has not the money to pay for treatment in a hospital or sanitorium and can not procure such treatment by charity, or if no inebriate hospital or sanitorium is at hand, even he must die if it takes more than one pint of liquor in ten days to save his life; for no hospital or sanitorium of any class other than that favored by the statute can give him the excess alcohol, and no physician outside of such a hospital can prescribe it. Even in a station-house, work-house, or jail, where control of dosage is clearly possible the excess could not be lawfully given even to a person in the midst of an attack of delirium tremens. If unreasonableness and arbitrariness of dosage is sought, it is certainly found here.

Statutory Quantitative Limits on the Dosage of Liquor are a Bar to Progress and Possibly to Safety.

The statutory quantitative limits on the medicinal use of liquor destroy all opportunity to study in the United States, by experiment or by clinical observation, the effect of alcohol in preventing and curing disease when administered in doses exceeding such limits. Such limi-

tations will effectually prevent the adoption in the United States of any method of preventing or curing diseases that may be discovered in foreign lands, that calls for doses of liquor in excess of those fixed by the statutes. If it be claimed that such handicaps on the science and art of medicine and on the prevention and cure of disease are necessary to procure the social and economic advantages sought through the prohibition on the beverage use of liquor, the answer is that no such handicaps have been found necessary on the sacramental and industrial use. And if the prohibition of the beverage use of liquor actually prohibits—and here it must be presumed that it does—that circumstance implies, or should imply, not the need for limiting the medicinal use of liquor, but greater opportunity and safety in such use. For if prohibition on beverage use be effective, the physician can with safety prescribe liquor.

Statutory Quantitative Limitations on the Medicinal Use of Alcohol are Unnecessary, Discriminatory, Arbitrary and Unreasonable.

It may be contended that, notwithstanding all that has been said, the quantitative limitations Congress has imposed are reasonable and necessary to meet the ends in view, the prevention of the use of liquor as a beverage and that if, in order to effect that end, the sick suffer and some die, they merely pay the penalty for living in the social state. Any contention as to the necessity for statutory maximum doses in connection with the medicinal use of alcohol loses its force, however, when it is observed that no similar limitations have been found necessary on wines used for sacramental purposes and alcohol used in industry. The rabbi determines the quantity of wine needed, and he is entitled to it as a matter of right. The manufacturer determines the necessary

amount of alcohol—for instance, liquor for the making of ice cream and ices, Section 860, Regulations 60 etc.,—and if he satisfies the Prohibition Commissioner that it is needed, and that the end of the product will be a lawful one, he is entitled to it. But not so the physician. He may argue and plead for the welfare of his patient; he might even convince the Commissioner of the justice of his cause; but it would be of no avail, for the Commissioner himself is powerless.

On the rabbi, minister, priest and manufacturer, Congress has imposed regulation. On the physician, Congress has imposed prohibition. Why? For no discoverable reason. The distinction is arbitrary and unreasonable. The medical profession does not seek freedom from regulation and supervision. The good name of the profession will be best safeguarded by some such control; but it does protest against the prescribed statutory dosages of liquor as arbitrary and unreasonable. If such prohibitions are not necessary to confine sacramental and industrial alcohol in sacramental and industrial channels, neither are they necessary to confine medical alcohol in medical channels. If regulations are sufficient to control sacramental and industrial alcohol, they are sufficient to control medical alcohol.

True, the rabbi, priest and minister, and the manufacturer, can be required to show the Commissioner the need for any given quantity of liquor before he is permitted to obtain it, while the physician's patient cannot wait for any such formality. But if the Commissioner cannot pass judgment on the good faith and discretion of the physician before his prescription is filled, he can do so afterward. The physician's prescriptions even now can be inspected in the pharmacies where they are compounded. The physician himself is required to keep records that are open to inspection. He is required to file with the Prohibition Administrator a copy of every

prescription he issues. Unless he does so, he cannot get additional official prescription blanks, and without such blanks he cannot prescribe. If he should hereafter under some conditions be required to file copies of his prescriptions with the Prohibition Administrator immediately after issue, in order to permit prompt investigation to be made, if deemed necessary, this can easily be required by regulation.

The physician whose conduct is even under suspicion may be summoned by the Commissioner of Internal Revenue or his representative to explain his conduct, and if he has not in good faith complied with the law, his permit may be revoked (Section 9, Title II, National Prohibition Act), and he is liable to fine and imprisonment (Section 29, Title II, National Prohibition Act). To urge that such regulation is inadequate and that statutory quantitative limits are necessary in the case of the physician, while regulations alone adequately control priests, rabbis, ministers and manufacturers, hardly commands the respect of men of practical judgment.

Nor does the fact that the Prohibition Commissioner can pass judgment in advance on the needs of the minister, rabbi, priest and manufacturer, serve to justify the discrimination; for, after all, it is not what the permittee says he intends to do with the liquor he obtains that tells the story, but what he does with it. And it is certainly as difficult for the Commissioner to see that the minister, rabbi, priest, and manufacturer uses the liquor allotted to him, for the purpose stated in his permit, as it is for him to see that the liquor prescribed by a physician, which never comes into his possession, is used by the patient for the medicinal purpose stated in the prescription and on the physician's record. The supervision and control already recognized as adequate in the case of industrial and sacramental alcohol are no less adequate in the case of medicinal alcohol. Quantitative prohibitions

have not been found necessary in the one case, they are not necessary in the other. If they are not necessary they are arbitrary and unreasonable—and, it is respectfully submitted, unconstitutional.

Respectfully submitted,

WILLIAM C. WOODWARD,
on behalf of
AMERICAN MEDICAL ASSOCIATION,
as amicus curiae

EXHIBIT A.

Opinions of Physicians as to the Dosage of Alcohol, and Spirituous and Vinous Liquor.

That alcohol can be utilized as a food, supplying heat and energy, is now conceded. Benedict writes:

> "Thus it is definitely proved that alcohol in not too large doses—that is, about 72 grams (about 2½ ounces) per day—is oxidized in the human body and the energy that it furnishes in its oxidation may contribute to keeping the body warm, to replacing other nutrients in the diet, and possibly to the performance of muscular work. Seventy-two grams of alcohol contributing 500 calories to the daily ration are more completely burned than 500 calories supplied in the form of almost any other substance, with the possible exception of pure sugar. This has been demonstrated clearly by actual measurements of the heat output of man inside of a respiration calorimeter, first, when subsisting on an ordinary diet, not containing alcohol, and then under exactly the same experimental conditions when 500 calories of fat or carbohydrate, or both, were replaced by 500 calories of alcohol. The experimental evidence is extensive and admits of no controversy." *Alcohol and Human Physiology, by Francis G. Benedict, Nutrition Laboratory of Carnegie Institution of Washington, Boston, Mass., in Industrial and Engineering Chemistry, April, 1925, Vol. 17, page 423.*

Starling writes to the same effect:

> "The evidence that alcohol may serve as a direct source of muscular energy is as adequate as the evidence that fats can be so utilized.
>
> "These experiments show that an amount of alcohol equivalent to that in a bottle of claret can be given in the course of the day without inter-

fering with the normal metabolism, the alcohol functioning as an ordinary food and serving as a source of energy which may be used either for maintaining the heat of the body or for the production of muscular work." *The Physiologic Action of Alcohol, by Professor Ernest H. Starling, C. M. G., M. D., F. R. C. P., Fouderton Professor of Physiology, Royal Society; Harveian Orator, Royal College of Physicians, 1923; late Scientific Adviser to the Ministry of Food, etc. in the Practitioner, London, October, 1924, Volume 113, page 230.*

Whether alcohol be or be not undesirable as a food for persons in health, there seems to be no adequate reason for rendering it unavailable for food purposes in the treatment of the sick. The amount stated above by Benedict as susceptible of utilization daily as a source of heat and energy would exhaust the statutory, maximum 10-day allowance in less than four days.

In his Text-book of Pharmacology and Therapeutics, copyright in 1924, Cushny writes concerning the food value of alcohol as follows:

"Alcohol, therefore, acts as a substitute for carbohydrates (starches and sugars) and fat in the food and is utilized like them for the production of heat and work. Higgins has shown that its oxidation begins about five to ten minutes after it is swallowed; the body begins to utilize it as quickly as it does ordinary sugar. *Page 188.*

* * * * * * * *

"The food-value of alcohol is unchanged by the presence of fever (Ott); it demands less energy from the digestive organs than fats and starchy foods, and has a higher value as a producer of energy than sugar. It cannot supply the place of the nitrogenous foods, but given along with them, may lead to a greater economy of the tissues. Strong wines or diluted spirits are generally employed here and ought to be given in small quantities frequently." *Page 197.*

In view of the present tendency to discredit the use of alcohol in septic conditions and acute fevers, the following statement from Cushny is of interest:

> "Alcohol was formerly advocated especially in septic conditions, and here it may be of value on the same grounds as in acute fevers, although it does not seem to have any specific action in septic disease, as was once believed. A protest has recently been raised against the use of alcohol in these cases, on the ground that animals subjected to alcohol succumb more readily to infection than controls which have received no treatment, but this increased susceptibility does not seem to be induced by doses proportioned to those in use in modern practice. In addition, this deleterious action may be more than compensated for by its value as a food and by its narcotic effects allaying the nervous irritability and promoting sleep; this narcotic action may very well be conceived to be of benefit to man, while prejudicial to animals." *Page 197.*

Concerning the use of alcohol as a food in the treatment of diabetes, Cushny says:

> "In the treatment of diabetes by the withdrawal of carbohydrates, alcohol has been advised to maintain the supply of energy, which it does without increasing the sugar of the blood and urine. Here wines or beers are not available, and pure alcohol diluted to about 5 per cent is the best form; it may be given in quantities corresponding to 5-10 c. c. (one-sixth to one-third of an ounce) of absolute alcohol every hour, and causes no symptoms, as it is completely oxidized in this time, and supplies 600 or more calories per day." *Page 198. A Text-book of Pharmacology and Therapeutics, by Arthur R. Cushny, M. A., M. D., LL. D., F. R. S., Professor of Materia Medica and Pharmacology in the University of Edinburgh; formerly Professor of Materia Medica and Therapeutics in the University of Michigan, and*

later in the University of London, 8th Edition, Philadelphia and New York, copyright, 1924.

The amount of alcohol that may be used as a food is stated in the British Pharmaceutical Codex as follows:

> "It is employed as a food both during fevers and in convalescence from fevers, but when used for these purposes the dose should not exceed 3 or 4 fluid ounces of alcohol per diem." *The British Pharmaceutical Codex, 1911, An Imperial Dispensatory for the Use of Medical Practitioners and Pharmacists. Published by Direction of the Council of the Pharmaceutical Society of Great Britain by the Pharmaceutical Press, London, 1911, pp. 79-80.*

The lower of the two doses named above will exhaust the statutory maximum ten-day allowance in less than 3 days.

Sollmann in discussing the use of alcohol in exhausting fevers says:

> "The amount must be governed by the previous habits of the patient; but astonishingly large quantities can often be given to fever patients without producing 'intoxication' even if they are unaccustomed to its use; the febrile organism probably oxidizing the alcohol more rapidly. Ordinarily one may begin with ½ to 2 tablespoonfuls (¼ to 1 ounce) of brandy in half a glass of milk, every 3 hours, increasing the frequency as needed." *A Manual of Pharmacology and its applications to Therapeutics and Toxicology, by Torald Sollmann, M. D., Professor of Pharmacology and Materia Medica in the School of Medicine of Western Reserve University, Cleveland, 2nd Ed. Philadelphia and London, copyright 1922, Page 648.*

One tablespoonful every 3 hours, for 6 doses a day, will exhaust the statutory ten-day allowance in less than

6 days. Doses of two tablespoonfuls would exhaust it in less than 3 days.

Hobart Amory Hare, in 1918, wrote:

> "In fevers of a typhoid type, the dose of whiskey or brandy may be for an adult from ½ to 2 ounces (15-60 c. c.) every three or four hours. More than a pint in twenty-four hours is rarely required, but this amount often does great good and is not excessive if the patient is accustomed to its use and needs supporting treatment." *A Text-Book of Practical Therapeutics, by Hobart Amory Hare, M. D., B. Sc., Professor of Therapeutics, Materia Medica, and Diagnosis in the Jefferson Medical College of Philadelphia, copyright 1918, pp. 81-82.*

The statutory ten-day allowance of whiskey or brandy obviously falls far short of supplying the needs of the patient as stated by Hare.

Dosages of alcohol suggested by American physicians since the enactment of the National Prohibition Act must be interpreted with the limitations of that Act in mind. A physician may well hesitate to recommend to his readers the use of alcohol in unlawful quantities even though he believes them advisable medically. And what he writes cannot be depended on to show whether he has stated doses in deference to the law or in deference to scientific knowledge. For instance, the ninth edition of Osler's Principles and Practice of Medicine, copyright in 1920, says nothing regarding the use of alcohol in the treatment of lobar pneumonia. The preceding edition, however, copyright in 1912, in discussing the treatment of pneumonia, says:

> "Alcohol is generally advisable, best as whiskey in amounts of 4-12 ounces in the twenty-four hours." *The Principles and Practice of Medicine, by Sir William Osler, BT., M. D., F. R. S., Fellow of the Royal College of Physicians,*

London, etc., with the assistance of Thomas McRae, M. D., Fellow of the Royal College of Physicians, etc., 8th Ed., New York and London, copyright 1912, p. 100.

In discussing the treatment of lobar pneumonia, Elsner says:

> "Finally, the alcoholic stimulant upon which I depend in severe asthenia is Tokay wine. Only the genuine Hungarian wine should be used. This is administered in tablespoonful (½ ounce) doses every half hour, and may be given with the ethereal stimulant when due. It has the decided advantage of containing an ethereal oil with a large alcohol content." *Forschheimer's Therapeusis of Internal Diseases, Edited by Frank Billings, S. M., M. D., Professor of Medicine, University of Chicago and Rush Medical College, copyright 1914; article on "Lobar Pneumonia," by Henry L. Elsner, Professor of Medicine, Medical Department of Syracuse University, Vol. II, page 254.*

Administration at this rate for 16 hours a day would exhaust the statutory ten-day allowance of wine, 1 quart or 32 ounces, in two days.

Dr. Francis Hare, Medical Superintendent of the Norwood Sanatorium, Beckenham, England, writes of the treatment of alcoholism by the reduction method as follows:

> "Certainly such a reduction as that made by myself in the past, namely from 26 fluid ounces or more to 8 or 10, and often still made by others, is amply sufficient to precipitate an attack of delirium tremens. The first reduction should never exceed 3 or 4 fluid ounces; the second should not much exceed, the third may be a little larger. But perhaps as a general rule the safest plan is to begin with the amount of established tolerance and subtract 2 ounces regularly every 24 hours." *The*

Practitioner, London, July-December, 1924, Vol. 113, pages 299-300.

Administered according to Hare's recommendation, the statutory maximum ten-day dosage of whiskey might not carry a patient suffering from acute alcoholism through even a single day, unless he could go to an inebriate asylum.

Purves Stewart writes as follows regarding the use of alcohol in cases of the treatment of acute alcoholism:

> "Both delirium tremens and alcoholic epilepsy may be prevented by avoiding sudden withdrawal of alcohol. Supposing the patient has been taking a bottle of whisky daily (equivalent to 25 fluid ounces), it is advisable to cut this down by about 4 or 5 oz. daily. Experience has shown that when this is done delirium tremens and alcoholic epilepsy hardly ever occur; more than this, if premonitory symptoms, such as restlessness, insomnia and tremor have already appeared, they may be aborted in some cases by temporarily raising the dose of alcohol." *A System of Treatment, Edited by Arthur Latham, M. A., M. D., Oxon.; F. R. C. P. Lond. Physician and Lecturer on Medicine, St. George's Hospital and T. Crisp English, M. B., B. S., Lond.; F. R. C. S. England, Senior Assistant Surgeon and Lecturer on Practical Surgery, St. George's Hospital. New York, 1912; article on "Alcoholism" by Purves Stewart, M. D., F. R. C. P., Physician to Out-patients, Westminster Hospital; Physician, West End Hospital for Nervous Diseases, Vol. I, pages 499-500.*

In discussing the treatment of pneumonia, Savill says:

> "Concerning alcohol, there is much difference of opinion. It is particularly indicated in alcoholic patients, for whom it should be used freely (4 to 12 ounces whiskey in 24 hours), and especially in conditions of collapse near the crises,

when it may tide the patient over so that he is out of danger before the subsequent depressing effects of the drug become manifest." *A System of Clinical Medicine by Thomas Dixon Savill, M. D., London, Sixth Edition, 1922, page 155.*

Regarding the use of whiskey in typhoid fever, Shattuck says:

"Three or four ounces of whiskey or its equivalent rarely needs to be exceeded during twenty-four hours; but cases now and then are met with in which it should be given, usually to tide over an emergency, up to the limit of toleration." *Forscheimer's Therapeusis of Internal Diseases, edited by Frank Billings, S.M., M.D., Professor of Medicine, University of Chicago and Rush Medical College, copyright 1914; article on "Typhoid fever," by Frederick C. Shattuck, A.M., M.D., Sc.D., LL.D., Jackson Professor of Clinical Medicine Emeritus, Harvard University.*

Vincent and Muratet, in discussing the treatment of typhoid fever and paratyphoid fevers, say:

"Alcohol in all its forms (wine, rum, cognac, liqueurs) is a good tonic. English physicians give doses of alcohol which we regard as excessive, sometimes more than a litre (quart) in 24 hours. In France an average of 80-100 grammes (3 or 3½ ounces) of alcohol is given. Frequent use is made of wine, chiefly champagne, which the patients tolerate and drink readily, especially when it is iced." *Medical and Surgical Therapy edited by Surgeon General Sir Alfred Keogh, K.C.B., C.B., LL.D., M.D., etc., New York and London, copyright 1918; article by H. Vincent and L. Muratet on "Typhoid Fever and Paratyphoid Fevers," page 143.*

Sollmann states the average dose of whiskey as ½ ounce, or 1 tablespoonful. *A Manual of Pharmacology and its applications to Therapeutics and Toxicology, by*

Torald Sollmann, M.D., Professor of Pharmacology and Materia Medica in the School of Medicine of Western Reserve University, Cleveland, 2nd Ed., Philadelphia and London, copyright 1922, page 659.

The dosage of brandy and whisky for an adult, laid down by the National Standard Dispensatory, edited by Hobart Amory, Hare, B.Sc., M.D., Professor of Therapeutics and Materia Medica and Diagnosis in the Jefferson Medical College of Philadelphia, and others, 3rd Edition, copyright in 1916, page 136, is from ½ ounce to 2 ounces every 3 or 4 hours.

In his "Therapeutics, Materia Medica and Pharmacy," 12th Edition, Philadelphia, Copyright 1912, Samuel O. L. Potter, A.M., M.D., M.R.C.P., London, formerly Professor of the Principles and Practice of Medicine in the Cooper Medical College of San Francisco, in discussing "Alcohol," page 102, gives the doses of whiskey and of brandy as from ¼ ounce to 2 ounces and the dose of white or red wine as from 1 ounce to 4 ounces.

James Macdonald, M.A., M.D., President of the Border Counties Branch of the British Medical Association, in an address "On the Remedial Use of Alcohol," reported in the British Medical Journal, January 30, 1909, page 267, named doses that would exhaust our present statutory ten-day allowance in 2 or 3 days, saying:

> "But in whatever form alcohol is applied the dosage must be definite—6 to 9 ounces being a reasonable daily range for an adult—its employment must be subject to frequent revision, and it must be at once withdrawn when the object for which it was given is attained."

As to the amount of alcohol necessary to produce intoxication, Benedict writes:

> "A moment's reflection with regard to the amount of alcohol that can be taken by a man at one time without incipient intoxication shows that,

according to laboratory experience, the equivalent of 20 to 30 cc. (⅔ to 1 ounce) of pure alcohol may be taken in this way by the average man, even on an empty stomach, without obvious signs of incipient intoxication. This is quite irrespective of whether the man is used to alcohol." *Alcohol and Human Physiology, by Francis G. Benedict, Nutrition Laboratory of Carnegie Institution of Washington, Boston, Mass., in Industrial and Engineering Chemistry, April, 1925, Vol. 17, page 426.*

SUPREME COURT OF THE UNITED STATES

No. 301 [illegible] 47 1

SAMUEL W. LAMBERT

Appellant

against

EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; DAVID H. BLAIR, as Commissioner of Internal Revenue, and EMORY R. BUCKNER, as United States Attorney

PETITION FOR REHEARING

JOSEPH S. AUERBACH
Attorney for Petitioner

JOSEPH S. AUERBACH
MARTIN A. SCHENCK
Of Counsel

APPEAL PRINTING CO., 32 THAMES ST., NEW YORK CITY

Supreme Court of the United States

OCTOBER TERM, 1925.

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EDWARD C. YELLOWLEY, as Acting Federal Prohibition Director; DAVID H. BLAIR, as Commissioner of Internal Revenue, and EMORY R. BUCKNER, as United States Attorney.

PETITION FOR REHEARING.

Rehearing herein is asked because

(a) The Court has been under a misapprehension as to the state of the record; and

(b) By reason of such misapprehension, has applied a new rule as to the constitutionality of legislation which surrenders judicial control or review of its necessity or appropriateness.

Your petitioner urgently submits that this new rule—that legislation attacked as unreasonable in that it was passed without investigation or finding, must be supported as embodying an *implicit finding* against the point of attack—has been confused with an entirely alien and

inapplicable presumption of good faith. This rule, new so far as your petitioner has been able to ascertain, has, it seems to your petitioner, been annunciated by this Court without realization of the extreme denials of actuality it involves.

Misapprehension of record as to the absence of any Congressional inquiry on necessary dosage in stated periods of time.

Your petitioner, in his complaint, has attacked as unconstitutional one, and only one, provision of the legislation, namely, that clause which prohibits the prescription of more than one pint of spirituous liquor in ten days. It is unnecessary to state that the reasonableness or unreasonableness of other features are not involved in this litigation. Whether or not upon other features of the legislation hearings were had or testimony taken is here entirely beside the point.

There has been in this case, in the District Court, a judicial investigation into this state of the Congressional records and a judicial finding that the prohibition of a pint in ten days was preceded by no inquiry or finding. After the case had been *sub judice* before Judge KNOX for nearly three months he summoned to his chambers counsel for the Government and for the complainant and asked of them whether there had been any prior Congressional finding as to the adequacy of the dosage of one pint in any ten days as provided in the Volstead Act. Counsel for the Government insisted that there had been such a finding, while counsel for the complainant stated that their previous careful investigation had resulted in discovering no such finding.

Thereupon counsel for the Government were given an

extended time within which to produce any such finding, and counsel for the complainant undertook, as officers of the Court, to conduct a further exhaustive investigation on the subject.

At the expiration of such time counsel again appeared before Judge KNOX at his request, and each counsel announced that in the interim no such Congressional finding or even consideration had been discovered.

It had not been discovered for the reason that no such finding existed. The following judicial finding by Judge KNOX was therefore not casual, but the result of an inquiry of the formal character indicated.

Judge KNOX held (Record, p. 15):

> "So far as I am informed, the legislation complained of does not purport to be based upon any finding as to the quantity of liquor that reasonably and properly may be required within a specified period for the treatment of disease. If otherwise, I should be inclined to dismiss the bill, it being my impression that within reasonable limits the quantity to be prescribed may be regulated by Congress. But, accepting the complaint as made, the limitation now imposed seems to be arbitrary and without justification. Should the proof show the contrary to be the fact, the complainant of course cannot prevail."

Judge KNOX in his opinion (Record, p. 16) immediately thereafter quotes a formal declaration which might well be considered an explicit finding negativing any implicit finding: In the report of the Senate Judiciary Committee dated June 11, 1917, in which the adoption of the concurrent resolution submitting the amendment to the States was recommended, the Committee therein stated:

> "Alcohol would still be manufactured, distributed

and sold under the restrictions appertaining to other poisons; and in use as a medicine, and in the arts would not be interfered with."

The Government's brief in the Circuit Court of Appeals frankly admitted that on the subject of necessary dosage no testimony had been taken, saying at page 34:

> "The testimony before the Senate Judiciary Committee reveals *only* the following statement made by Wayne B. Wheeler, which was as follows:
>
> " 'This section (Sec. 7), provides how alcohol for non-beverage purposes and wine for sacramental purposes may be sold. This section continues substantially the present system of the Federal Government, which applies especially in prohibition territory. Under Treasury Decisions 2788 it is unlawful for a pharmacist to sell alcohol in quanties of more than one pint unless it is medicated so as to be unfit for beverage purposes. Persons who desire to purchase alcohol in quantities of more than one pint must secure a permit and give a bond that they will use such alcohol only for permitted purposes. Sec. 7 permits persons to secure the alcohol or wine under these regulations until they expire, but requires that the system be made uniform by December 21, 1920. It provides also that physicians who are to prescribe alcohol shall secure a permit from the Commissioner or other officer of prescriptions issued, and keep a record. This plan will hold in check physicians who are inclined to issue prescriptions for beverage purposes. It may be a slight burden upon the regular physician who will not violate the law. Every day, however, places some extra burden upon law-abiding citizens in order to reach the person inclined toward lawlessness. South Dakota (Sec. 39) and other States require physicians to take out permits if they prescribe alcoholic compounds.

(Hearing before the Senate Judiciary Committee of the 66th Congress, page 85)."

It will be noted that this statement of Wayne B. Wheeler does not purport to give any consideration to the pint in ten day provision or to a possible relationship between a pint in ten days and the cure of any known ailment.

In the same brief, at page 35, the Government pointed out that the source of the limitation of one pint was a taxing statute. The portion therein quoted limits the quantity to one pint, *but does not contain any limitation in period of time or any reference to ten days.* It is the ten day feature used in combination with the one pint limit which constitutes the medical prohibition. Why or when these two elements were first combined is unknown. No medical opinion has any relationship whatsoever to the subject.

Before this Court the Government's brief took a somewhat different attitude toward the question, and, without setting forth text or detail, made the general assertion of exhaustive hearings by Congress—not, it will be noticed, in regard to the feature of the legislation solely before the Court—and further generally asserted that the facts adduced were ample to support the legislation. The Government's brief in this connection, stated, at page 13:

> "Committees of Congress conducted exhaustive hearings both at the time of the passage of the original Prohibition Act and during the summer and fall of 1921 when the Supplemental Act was before it, and the facts adduced were ample to support the legislation. (Congressional Record, 67th Cong., 1st Sess., Vol. 61, pp. 3091-3135, 3454-3461, 3590-3596, 4032-4039, 8748-8757.)
>
> "At the hearings before the Congressional Com-

> mittees the entire subject of the medicinal use of beverage intoxicants was thoroughly gone into."

It is respectfully submitted that these general statements were on this particular subject unintentionally misleading. Regardless of the exhaustive hearings in their relation to the general subject-matter, and regardless whether the facts adduced were ample, in the opinion of the Government, to support the legislation, the impression should not have been created by the very generality of the language, that the particular feature of a pint in ten days as dosage for all ailments under all circumstances was ever the subject of any hearings or that any facts were adduced to support it.

This state of the record, it is respectfully submitted, and the changed attitude which the Government has taken toward its investigation inaugurated at the request of Judge KNOX, has led this Court to overlook the entire absence of inquiry into the amount of dosage of spirituous liquor, and to regard evidence *subsequently* before Congress in regard to beer not being a medicine as involving (through implication) a hearing and determination that spirituous liquors (conceded by the Government herein to be medicine and in terms treated as such) ceased to be a medicine in amounts beyond a pint in ten days.

The matter is too important for implications which contradict the facts. The Government should be required to produce before this Court the complete text of everything claimed to constitute hearing, testimony, evidence, or consideration of the adequacy, under any medical opinion whatsoever, of one pint in ten days in the treatment of any known ailment or disease.

The supreme importance of the facts as to these Con-

gressional hearings, the conclusions of which were agreed to by the counsel for the Government and for the complainant before Judge Knox is unmistakable. For to the facts elucidated in these hearings recourse must be had to sustain the constitutionality of Section 7. That this is clear beyond question is apparent from this: If Congress without inquiry had enacted Section 7 under the authority of the 18th Amendment which prohibited the manufacture, etc., of liquors for beverage purposes only, counsel for the complainant insists that no one representing the Government would have the hardihood to claim that Section 7 was constitutional. The sole justification for now holding the contrary is the implication of findings precluding judicial inquiry into what otherwise is unreasonable and arbitrary control of medical practice.

Misapprehension of the Court as to the novelty and extremity of its ruling that implicit findings must be considered as made to support the prohibition of more than one pint in ten days.

This Court has herein stated:

> "Not only so, but the limitation as to quantity *must be taken as embodying an implicit Congressional finding* that such liquors have no such medicinal value as gives rise to a need for their more frequent prescriptions."

Your petitioner recognizes the rule as set forth in *Muller* v. *Oregon*, 208 U. S., 412, 421, that this Court will take judicial cognizance of all matters of *general knowledge* in reviewing the reasonableness of legislation and will attribute such knowledge to the Legislature.

But the subject-matter herein is not one of general knowledge. There is no presumption that Congressmen

intuitively know such matters, even when they are assembled in Congress. The discoverer of any relationship between a pint in ten days and health remains anonymous; and any presumption on the subject where the exact facts are capable of ascertainment is, we respectfully submit, unwarranted as is any presumption on a subject not of general knowledge when it proceeds in denial of the facts.

The determination of the case at bar upon implicit findings of Congress on the subject has, it is respectfully submitted, led to a contradiction between the case at bar and the recent case of *Everard's Breweries* v. *Day*, 265 U. S., 545. The legislation prohibiting beer as a medicine proceeded, as determined by this Court, upon inquiry and conclusion that beer in fact was not a medicine. This Court, at page 562, stated that Congress, in the light of testimony, determined that malt liquors possessed no substantial and essential medicinal properties, and that

> "as a matter affecting the public health, it was sufficient to permit physicians to prescribe spirituous and vinous intoxicating liquors in addition to the non-intoxicating malt liquors whose manufacture and sale is permitted under the National Prohibition Act."

This Court further stated, at page 562:

> "The distinction made by Congress between permitting the prescription of spirituous and vinous liquors while prohibiting the prescription of malt liquors is not plainly unreasonable or without a substantial justification, based upon their essential differences."

The Court in the case at bar, in regard to *Everard's Breweries* v. *Day*, has held that if adhered to it disposes

of the present case; that from the standpoint of power both cases are the same; and, so far as expediency is concerned, the matter is solely for the consideration of Congress.

It is respectfully submitted that such a conclusion of identity as a matter of the Congressional power rests—and can solely rest upon the implicit Congressional finding—contrary to the facts—which has been made the basis of the decision herein.

The genesis of the Willis-Campbell legislation was the promulgation of an opinion by the then Attorney-General, Mr. A. Mitchell Palmer, as to medicinal prescriptions of beer. The Congressional investigation began, continued and ended with the subject of beer. And we can do no better, in substantiation of this statement, than to quote from the brief of the Government in this case before the Circuit Court of Appeals:

> "On March 3, 1921, the retiring Attorney-General rendered an opinion which held that as Congress had not mentioned or limited the prescription of beer in Section 7 of the Volstead Act, the Commissioner of Internal Revenue had no right to do so and that permits should issue to brewers to manufacture beer for medicinal purposes and to doctors to prescribe it without limitation. (Opinions A. G. March 3, 1921.) Almost immediately a bill was introduced in Congress which was the origin of the Supplemental Act of November 23, 1921."

And the production before this Court of these hearings will, so far as we are informed, disclose the fact that not one authoritative word was uttered or intimated as to the adequacy of the dosage of one pint in ten days.

It is respectfully submitted that the rule, which heretofore has been that statutes are protected against an attack

of unconstitutionality by virtue of legislative findings, has been predicated upon the actuality of such findings.

Radice v. *New York*, 264 U. S., 292, 294.

The present ruling that such findings may be inferred from the mere existence of the statute, in effect destroys the rule and makes no distinction so far as reasonableness is concerned between acts passed after consideration and acts passed without consideration into the facts. Under such rule the existence of the statute is sufficient and conclusive proof of reasonableness. Under such a rule the courts surrender their control as to the necessity or appropriateness of legislative measures affecting public health. Heretofore it has been clearly within the province and duty of the courts to determine matters of reasonableness in the absence of consideration on that subject by the legislative body.

It is respectfully submitted that the Court herein has not intended this sweeping change in the rule, particularly upon the state of the present record.

Dr. Lambert on one phase of his case urged as controlling the recent ruling of this Court (*Lindner* v. *United States*, 268 U. S., 5, at p. 18), that "obviously, direct control of medical practice in the States is beyond the power of the Federal Government."

This Court in the case at bar has now held that "there is no right to practice medicine which is not subordinate * * * to the power of Congress to make laws necessary and proper for carrying into execution the Eighteenth Amendment."

Your petitioner recognizes that while the overruling, by implication, of *Lindner* v. *United States* may have been intended herein, that particular feature of the case is not advanced as justifying a rehearing.

This Court, in thus overruling this recent decision has, in doubt, and sharp division, arrived at the conclusion, that prohibition of liquor for beverage purposes justifies prohibition of medicine administered in accordance with accepted medical practice. But the *method* of decision, that there *must* be a finding implied from the legislation itself, precluding a judicial determination of its unreasonable and arbitrary character, has been applied, we urgently submit, without a realization of its far-reaching and destructive effect upon the previous rule.

We desire to add the following in conclusion:

Admittedly the Eighteenth Amendment was aimed against the social and economic evils following in the train of unrestricted indulgence in intoxicating liquors—including the corner saloon and the neglected wife and family, etc. The Amendment deals with no other subject than *beverage uses of such liquors*, and yet by judicial construction—through acceptance of the declaration of counsel for the Government as to the extent and character of the hearings before the Congressional Committees—the Amendment has to all intents and purposes been so interpreted as if after the words "beverage purposes" "medicinal purposes" were added, or as if the words "beverage purposes" were deleted.

Thereby there is a disregard of the explicit finding and promise of the Senate Judiciary Committee in promulgating the Amendment, that the use of liquor in medicine should not be interfered with. This promise and finding was so solemn that Judge KNOX went so far as to hold that, in his opinion, without the inducement of that promise, and finding, the Amendment would not have been adopted by the States.

Nor is this all as to the judicial construction of the Amendment in its application to this case.

For Dr. Lambert and other worthy physicians under the prohibition Acts of Congress as now interpreted are forbidden to alleviate pain or even to prolong and save life by the administration of more than one pint of intoxicating liquor in any ten days—**even though it be by the restorative enema.** For that intoxicating liquors are thus not infrequently administered by *enema,* appears from the writings of the great clinicians of America, England, Germany, France and Italy, whose text books are referred to in the Appendix to the main brief for appellant in this case.

Yet Dr. Lambert becomes a criminal if he follows his own judgment fortified by the judgment of these accepted medical authorities, and thus prescribes more than one pint of liquor in any ten days to be administered by *enema.* It is, we respectfully submit, inconceivable that Congress in proposing the Amendment or that the States in adopting it had the remotest intention of conferring upon Congress a roving commission, by any implicit finding, to perpetrate such a wrong.

And we are of the view that the conclusions to which this Court has arrived will not be adhered to if the record of the hearings before the Congressional Committees in 1919 and even in 1921 be brought before it, rather than the inadvertently incorrect but unsupported statements of counsel for the Government as to what happened at those hearings.

Accordingly, we urge that the complainant, Dr. Lambert, is entitled to the relief prayed for in this petition.

Respectfully submitted,

JOSEPH S. AUERBACH,
Attorney for Petitioner.

JOSEPH S. AUERBACH,
MARTIN A. SCHENCK,
Of Counsel.

I certify that, in my opinion, the foregoing Petition is well founded, and that it is submitted in good faith and not for purposes of delay.

JOSEPH S. AUERBACH,
For the Petitioner.

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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 301

SAMUEL W. LAMBERT, APPELLANT

v.

EDWARD C. YELLOWLEY, AS ACTING FEDERAL PROHIBITION DIRECTOR, DAVID H. BLAIR, AS COMMISSIONER OF INTERNAL REVENUE, AND EMORY R. BUCKNER, AS UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR APPELLEES

OPINIONS OF THE COURTS BELOW

The opinion of the District Court (R. 12) will be found reported in 291 Fed. 640, and that of the Circuit Court of Appeals (R. 21) in 4 F. (2d) 915.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on the 25th or 26th of December, 1924. (R. 33.) Appellant appeals to this Court under the provisions of Sections 128 and 241, Judicial Code, as

those sections stood prior to the Amendment of February 13, 1925 (Ch. 229, 43 Stat. 936). The appeal was allowed February 6, 1925. (R. 34.)

STATEMENT

An injunction was issued by the District Court for the Southern District of New York upon the prayer of appellant, a physician of admitted standing and experience in New York City, enjoining the Commissioner of Internal Revenue and others from enforcing such portions of Section 7 of Title II of the National Prohibition Act of October 28, 1919, Ch. 85, 41 Stat. 305, and the Act supplemental thereto (Act of November 23, 1921, Ch. 134, 42 Stat. 222) as limit the quantity of intoxicating liquor which he as a physician might prescribe, on the grounds that said Acts were to such extent unconstitutional, unreasonable, and arbitrary legislation unauthorized by the Eighteenth Amendment to the Constitution. The Circuit Court of Appeals for the Second Circuit reversed the decree of the District Court and directed a dismissal of appellant's bill (R. 33), holding that the restriction upon physicians as to the amount of spirituous and vinous liquors which they may prescribe within a given time is appropriate legislation within the meaning of the Eighteenth Amendment, whereupon complainant appealed to this Court.

STATUTES INVOLVED

The National Prohibition Act and the Act supplemental thereto limit the quantity of liquor a physician may prescribe for one patient within any ten-day

period to one pint of spirituous liquor or one quart of vinous liquor, or in case of a combination of the two not more than a total of one-half pint of alcoholic content. The two sections of law follow.

Section 7, Title II, of the National Prohibition Act, of which complaint is made, reads in part as follows:

> No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word "canceled," together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.
>
> Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose.

Section 2 of the Supplemental Act reads, in part:

> That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void. No physician shall prescribe, nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall anyone prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall any physician issue more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinary reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him. But this provision shall not be construed to limit the sale of any article the manufacture of which is authorized under section 4, Title II, of the National Prohibition Act.

QUESTION PRESENTED

The question, simply stated, is whether Congress, while conceding the therapeutic use of alcoholic liquor, was acting within constitutional bounds in limiting the amount thereof which a physician could prescribe.

ARGUMENT

SUMMARY

The limitation upon a physician administering the best remedy, according to his judgment, of which appellant complains, is largely imaginary. Whisky and wine are administered for the drug effect in the alcohol. Doctors are not limited in the use of alcohol in medicinal compounds. Many other unlimited administrations of liquors are permitted under the Act. The only actual restriction a physician suffers is when he would administer spirituous or vinous liquors in palatable beverage form. No showing has been made that the desired curative properties may not be administered in some of the ways permitted under the law.

Congress placed no greater restrictions on physicians in the medicinal use of liquor than it did on manufacturers in the industrial use of alcohol. Sacramental uses can not fairly be compared.

The limitation of one pint of spirituous liquor per patient per ten days was only placed by Congress after careful study of the scientific facts upon which the decision rested and a further study of the laws of the several States, experience in their enforcement, and the interpretation thereof given by State courts.

The right to practice medicine is not an inherent right. It may be restricted by proper exercise of the police power. This limitation upon physicians administering beverage liquor by prescription was a proper and necessary exercise of police power.

Legislative acts are presumed constitutional. The statutes here involved did not exceed the delegated powers of Congress under the Eighteenth Amendment.

I

THIS COURT HAS DECIDED THE CONTENTIONS HEREIN BY ITS OPINION IN THE "BEER CASES"

Exactly the same sections of law, in so far as they refer to malt products, were before this Court in *Everard's Breweries* v. *Day*, 265 U. S. 545. Congress absolutely prohibited physicians from prescribing intoxicating malt liquors for medicinal purposes, which prohibition was attacked as unconstitutional. Several cases were joined. Briefs before the Court were voluminous. This appellant filed a 118-page brief as *amicus curiae*. The same arguments were urged then as are here again relied on, notably (*a*) complainant's right as a doctor to prescribe for his patients as he deems proper; (*b*) the alleged reserved power of the States to regulate the practice of medicine; and (*c*) the argument that the States ratified the Eighteenth Amendment because it did not prohibit, and therefore they did not delegate to the Federal Government power to prohibit, the use of intoxicating liquor as a medicine.

We observe in further comparison of the briefs in the instant case with those in the "Beer Cases" that reliance is placed on almost the same medical men's opinions on the "Valuation of alcohol and beer as therapeutic agents." Affidavits adduced in the earlier case painted even a more vivid picture of the

essential character of beer as a medicine than do those produced by complainant in the instant case to prove the necessity for prescribing to a patient more than one pint of beverage liquor in ten days. Affidavits of individual physicians and resolutions by medical associations, though proper subjects for congressional consideration when passing these laws or for urging changes therein, seem of doubtful propriety here, but in as much as they are discussed in both opinions below and so much relied upon by appellant, brief comment may not be out of place.

One hundred five physicians whose names are attached to the complaint appear in a resolution to go on record as believing that the limitation—apparently any limitation—"is a wholly unwarranted reflection upon the good faith of the American medical profession as a whole," but they seem carefully to avoid going on record as maintaining that it is ever necessary to prescribe more than a pint of beverage intoxicants within ten days. Dr. Lambert in his allegations is equally indefinite, for he only avers that he has "certain cases" under his observation in which it is his "opinion that the patient should use internally more than one pint of beverage liquor in ten days."

Many ways of treating a patient by the use of intoxicants in various forms are left open, in spite of the restriction of the law under attack in this case. Section 7 of the Act only prohibits prescribing the "tasty," habit-forming, "fit for beverage" liquors

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to a patient for use in his home or elsewhere, as he may desire. No limitation is placed on the amount of liquor which a physician may order for a patient who is in a hospital. (Sec. 6, Title II, N. P. A.)

Nor is there any limitation whatsoever on the amount of alcohol which may be administered by a physician provided he compounds it with harmless bitters, herbs, or any of the substances well known to the medical profession that will destroy its essential character as a drink (as defined in Sec. 1, Title II, N. P. A.).

One of the circumstances listed by appellant as an instance wherein large quantities of beverage liquor should be administered is in treating a patient threatened with delirium tremens. No restriction is placed on the amount which may be given the patients confined in institutions for curing drunkenness. (Sec. 6, Title II, N. P. A.)

Medical preparations, many of which contain large proportions of intoxicating liquor, "manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary, or the American Institute of Homeopathy," that are not beverages may be furnished a patient in unlimited quantities. (Sec. 4, Title II, N. P. A.)

So also is there no limitation upon patent medicines, though their alcoholic content may be high. (Sec. 4, subdivision (c), Title II, N. P. A.)

Dr. Lambert, basing his complaint of unwarranted congressional interference with the practice of his

profession on such a loose and indefinite reference to "certain cases" that he has under observation which need more than a pint of liquor, fails to show that they are not inebriates in an institution, patients in a hospital, or that he can not prescribe for them the required amount of alcohol necessary, in his opinion, for their cure through one of the several other ways the law leaves open to him. As a matter of fact, most of the carefully constructed argument of appellant falls if its scope is whittled down, as it fairly must be, to just such cases as, in his best opinion as a physician, have to be treated by liquor which *tastes* like a beverage. Admittedly, the therapeutic value usually lies in the drug effect of the alcohol, and the physician is not restricted in administering that if he does so in any other than a palatable form. The underlying fallacy in most of the argument based on the opinions of physicians shown in the brief and appendix thereto of the appellant, and that of the American Medical Association as *amicus curiae*, lies in the failure to show that alcohol in some other than beverage form would not do as well as a curative as potable spirituous liquors, such as whisky and wine, or that whisky and wine may not be stripped of their beverage character by addition of some harmless ingredient.

A questionnaire was sent to one-third of the physicians of the United States. Fifty-eight per cent of them replied. Of the twenty-one and five-tenths per cent of the physicians of the United States, therefore, who gave an opinion, a little more than half—to be

exact, only ten and ninety-six hundredths per cent of the medical men of the country—voted "yes" on the use of whisky as a therapeutic agency. But some of this ten per cent voting in favor of whisky "take exception to the word 'necessary,' claiming that no drugs are absolutely necessary." (Journal of American Medical Association, Jan. 21, 1922.)

We submit, therefore, that if Congress had had the benefit of the medical opinion collected by the questionnaire of the American Medical Association, it would have had no compelling reason not to have incorporated the restrictions in this law.

The limitation complained of is, therefore, mainly imaginary and applies only when the doctor keeps his patient outside a hospital and insists on prescribing the needed intoxicant in the potable uncamouflaged form of whisky, wine, or other beverage. There are no new contentions in all the arguments advanced by appellant which were not raised and considered by this Court in the "Beer Cases," and we submit that if, as decided in that case, this Court found (265 U. S. 545, 563)—

> no ground for disturbing the determination of Congress on the question of fact as to the reasonable necessity, in the enforcement of the Eighteenth Amendment, of *prohibiting* prescriptions of intoxicating malt liquors for medicinal purposes. (Italics ours.)

much more forcibly may it be urged that Congress could properly *limit* the quantities of intoxicating beverages to be prescribed within stated periods.

II

These restrictions on prescribing whisky and wine are "appropriate" legislation to enforce the Eighteenth Amendment

(a) The three-fold problem before Congress

After ratification of the Eighteenth Amendment, Congress, faced with the duty of enacting legislation to carry the constitutional provision into effect, could quite plainly cover the entire field of beverage liquor; but that was not enough. Three general nonbeverage uses of liquor—sacramental, medicinal, and industrial—had to be considered, as each, if left unchecked, had possibilities of developing into a source of supply for law violation.

An argument of the American Medical Association, and the appellant herein, is that Congress has dealt unfairly by the doctors; that "on the rabbi, minister, priest, and manufacturer Congress imposed regulation" only, but on the physician a prohibition so arbitrary as to be inappropriate legislation and unconstitutional. The charge is made that Congress did this without reason or necessity therefor. Let us examine the facts. When legislating on industrial alcohol Congress was clearly outside the field of beverage liquor. It was dealing not with a drink but with raw alcohol, the ingredient or derivative of a beverage. Manifestly, Congress could not *prohibit* in such a field, but it could and did set up an elaborate system of inspection and regulation of the alcohol business under proper government

permits. (See Title III of the National Prohibition Act.)

On sacramental uses Congress conducted elaborate hearings. It was dealing here with a beverage, but in the form of wine, bulky and less easily diverted than hard liquors. Furthermore, in placing this wine in the hands of the clergy, Congress was releasing it through a channel having greater safeguards than the mere conscientiousness and reliability of the individual, to wit, the safeguard of the powerful church organization which, in matters of sacrament, would be likely to devote a watchful eye to prevent the reproach of lawlessness from attaching to its religious rites.

To guarantee properly the medicinal use of intoxicating liquors presented quite a different and a much more complex problem. First, the liquor handled would vary from alcohol, which when made unpalatable by compounding other ingredients, was left unrestricted in the quantities of it the physician may administer, to the plain, habit-forming beverages, such as whisky and the delicate liqueurs and wines largely desired by patients for their palatable and appetizing taste. In so far, therefore, as the physician uses alcohol, he is left in a more advantageous position than the manufacturer. In fact he professionally is in an unrestricted field. But when he chooses to use alcohol in its beverage forms, he must place himself under the restrictions and prohibitions Congress has found reasonably necessary to make effective the prohibition of the traffic in beverage liquors.

(b) Congress investigated the facts

Committees of Congress conducted exhaustive hearings both at the time of the passage of the original Prohibition Act and during the summer and fall of 1921 when the Supplemental Act was before it, and the facts adduced were ample to support the legislation. (Congressional Record, 67th Cong., 1st Sess., Vol. 61, pp. 3094–3135, 3454–3461, 3590–3596, 4032–4039, 8748–8757.)

At the hearings before the Congressional Committees the entire subject of the medicinal use of beverage intoxicants was thoroughly gone into. It is noteworthy that in 1921, although the limitation of prescriptions to one pint in ten days had been in force for two years, not a single doctor appeared before the Committees to complain of the injustice of this limitation or that it did not meet with the approval of the physicians at large. It was in evidence that it was necessary to put some limitation upon prescriptions, because there were a few doctors at least who would greatly abuse the privilege. One physician, it was shown, had used 400 prescription blanks while all the other prescriptions used in his practice amounted to but 10 or 15, and another doctor had used as high as 700 within a comparatively short time when the rest of his practice showed that there were only a few prescriptions issued for normal needs. There was testimony to the effect that out of a total of 152,627 physicians in the country at the time, 78 per cent had failed to take out permits which would allow them to prescribe intoxicating

liquor, and that in 24 States not a single permit had been granted to a physician to prescribe such liquor. (See Hearings before House Judiciary Committee, 67th Congress, on H. R. 5033, Serial 2, pp. 15–16. For evidence upon the necessity of limitation in the laws, see p. 19, last par. Also statement of former Prohibition Commissioner Kramer, p. 146. Also statements by Senator Sterling, p. 3456; Senator Walsh, p. 4035; Senator Willis, p. 4036; Senator Nelson, p. 4038; and Mr. Volstead, pp. 8749–8750; Vol. 61, Cong. Rec., 67th Congress, 1st Session, relative to necessity for limitation.)

Another fact to which Congress gave some consideration was the resolution of the American Medical Association in 1917 disavowing the scientific basis for the use of alcohol and resolving that its use as a therapeutic agent should be discouraged. But this was only one incident in the many opinions and much testimony before the legislative body, and certainly subsequent resolutions by other groups of the American Medical Association softening the effect of the 1917 resolution hardly support the argument for declaring unconstitutional legislation that was passed by Congress as a result of the specific finding that the 1 pint limit of beverage liquor allowed for dosage in a 10-day period was a fair and "wise kind of limitation." (See Senator Walsh in response to questions on the act supplemental to the National Prohibition Act. Congressional Record, 67th Cong., 1st sess., Vol. 61, p. 4036.)

(c) Congress also considered the enforcement experience of the several States, their laws and the interpretation thereof by State courts.

In legislating for the entire nation Congress adopted a much more liberal policy with reference to the prescription of intoxicating liquors for medicinal purposes than obtained in a majority of the States which had adopted prohibition prior to the ratification of the Eighteenth Amendment. Experience in these States had shown the necessity for strictly regulating the use of intoxicating liquors for medicinal purposes, if the prohibition upon the beverage use was to be made effective.

When the Supplemental Act of 1921 was passed, approximately 40 States had restricted the prescription of beverage intoxicants in some form, and *in more than 30* the restriction was either the same as, or more rigid than, that provided in the Federal law. In eleven states, namely, Arizona, Georgia, Idaho, Kansas, Maine, Nebraska, New Mexico, North Carolina, Utah, Washington, and West Virginia, no intoxicating liquor of any kind could be prescribed. In Colorado the limitation was 4 ounces and in Michigan 8 ounces. In eleven other states, namely, Alabama, Arkansas, Delaware, Florida, Indiana, Mississippi, North Dakota, Oklahoma, Oregon, South Carolina, and Tennessee, pure alcohol only could be prescribed. Even in many of these States the amount of pure grain alchool that could be prescribed was limited. For instance, Alabama, Mississippi, and South Carolina limited the amount to one-half pint,

and Florida to 8 ounces. Some limited the amount of medicated alcohol that could be prescribed in medicines. The statute of Utah, for instance, made it unlawful "to prescribe any medicine containing in total content of such prescription more than 4 ounces of alcohol and such prescription shall not be refilled within seven days." All the above States, with the exception of Delaware, had adopted prohibition prior to the National Constitutional Prohibition. Congress here saw that the States which had been under prohibition for the longest period and so necessarily had the greatest experience to draw upon, such as, Maine, dry since 1851, and Kansas, dry since 1880, had found it necessary to limit or prohibit entirely the medicinal use of beverage liquors.

Attached to this brief will be found Appendix "A" giving a summary of the statutes of the various States at the time Congress was considering the act supplemental to the National Prohibition Act. Some changes have since taken place.

In Appendix "B" also will be found numerous decisions in the State courts showing the interpretation of these State statutes which restricted the prescription of spirituous liquors and which were similar in form to the restrictions adopted by Congress.

In view of the complexity of the problem facing Congress when it attempted to restrict or prohibit in the field of nonbeverage use of alcohol and beverage liquors, and the exhaustive hearings conducted by committees of Congress to ascertain so far as possible the scientific facts, it is manifest that Congress

adopted the limitation on the prescription of intoxicating liquor to a pint in a 10-day period as a result of the finding of fact made by it in that such restriction was necessary to keep alcohol when dispensed in palatable beverage form within the proper non-beverage constitutional uses; and it is further manifest that Congress did this in the light of experience had in the various States, that it intended to adopt the result of that experience and therefore passed this legislation with the same intent and purpose that had been manifested by State courts when interpreting similar provisions in State statutes and constitutions.

III

THERE IS NO RIGHT TO PRACTICE MEDICINE WHICH IS NOT SUBORDINATE TO THE POLICE POWER

As observed by this and other courts in a long line of cases, no inherent right exists to practice medicine that does not yield to the needs of the State in the fair exercise of its police power. The States delegated to the Federal Government police power over intoxicating liquor. Congress decided that mere regulation was not adequate to prevent the beverage use of liquors prescribed by physicians. The experience of the several States demonstrated this fact. Congress recognized State experience and in the exercise of its police power followed the lead of the States. Where there is conflict over the form in which a physician wishes to administer alcohol, the physician must yield to such requirements as "the lawful

authority deems necessary." *Gray* v. *Connecticut*, 159 U. S. 74. See also:

Dent v. *West Virginia*, 129 U. S. 114.
Watson v. *Maryland*, 218 U. S. 173.
Reetz v. *Michigan*, 188 U. S. 505.
O'Neil v. *State*, 115 Tenn. 427.
State v. *Davis*, 194 Mo. 485.
State v. *Rosenkrans*, 30 R. I. 374.
State v. *Edmunds*, 127 Iowa, 333.

IV

LEGISLATIVE ACTS ARE PRESUMED CONSTITUTIONAL

Elaborate reasoning has been marshalled in this case to support the theory upon which appellant's case rests that Congress in limiting the use of beverage liquors as a medicine has exceeded its constitutional power. This structure of argument falls before the clear statement of the rule in *Interstate, Etc., Railway Company* v. *Massachusetts*, 207 U. S. 79, where on page 88 of the opinion Mr. Justice Holmes says:

> It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained.

And again, the other complaint that regulation upon physicians in the medicinal use of beverage liquor to a greater degree than that placed upon the clergy in the sacramental use of beverage liquor is unwise and unnecessary and an abuse of the power of Congress, is met by this Court's statement in *Hamil-*

ton v. *Kentucky Distilleries*, 251 U. S. 146, quoting from page 161 of the opinion:

> No principle of our constitutional law is more firmly established than that this Court may not, in passing upon the validity of a statute, inquire into the motives of Congress * * * nor may the Court inquire into the wisdom of the legislation * * * nor may it pass upon the necessity for the exercise of power possessed, since the possible abuse of a power is not an argument against its existence.

CONCLUSION

In conclusion it is respectfully urged that the limitation placed upon physicians in prescribing beverage liquors is a fair exercise of the police power delegated to Congress under the Eighteenth Amendment; that the legislation was, after due consideration, deemed necessary, and in enacting it "Congress has affirmed its validity," and that this Court "by an unbroken line of decisions" has "steadily adhered to the rule that every possible presumption is in favor of the validity of an Act of Congress until overcome beyond rational doubt." (*Everard's Breweries case, supra*, p. 560.)

The wide diversity of views on the part of the medical profession shows that it was practically impossible for Congress to obtain any uniform opinion as to how much liquor should be allowed. There was abundant respectable opinion for eliminating alcoholic liquor entirely. Congress extended the privilege, however, as far as it thought safe, without

limit, in medical prescriptions, if the physician used alcohol, and restricted it when he chose beverage liquors; and in placing the limitation upon the latter, we submit Congress did not exceed its legislative discretion, nor did it unduly hamper a physician in administering alcoholic therapeutics; for, as pertinently stated in *Price* v. *Russell* (U. S. Dist. Court, Nor. Dist. of Ohio), 296 Fed. 263, 267:

> The Pharmacopeia and the National Formulary which have statutory approval in Section 4 of Title II of the Act, as well as common experience, instruct the physician in the compounding of a beverage intoxicating liquor with an ingredient, subject to his selection as innocuous in the specific case, which will deprive the result of palatability. Thus will his administration be taken beyond the scope of the law. We see nothing in the law which prevents resort to this expedient when alcoholic stimulant is indicated to the physician's judgment beyond the limitation of a half pint within 10 days. This compounding may be done, as the profession knows, and it is also known to intelligent laymen, without deterioration of the expected thereapeutic effect of the administration, except in those rare and negligible cases where the palate is to be tickled as part of the treatment, and these Congress seems to have provided for in section 6, where medical attention to such appetites is legislatively considered.

The statutes in question did not exceed the powers delegated to Congress by the Eighteenth Amendment; they have a real and substantial relation to prohibition enforcement, and deprive appellant of no fundamental rights. The decree appealed from should, therefore, be affirmed.

Respectfully submitted.

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APRIL, 1926.

APPENDIX A

A BRIEF SUMMARY OF THE PROVISIONS OF LAWS RELATING TO THE PRESCRIPTION OF INTOXICATING LIQUOR IN FORCE IN THE SEVERAL STATES AT THE TIME OF THE ENACTMENT OF THE SUPPLEMENTAL ACT.

ALABAMA

Pure alcohol only may be prescribed in a quantity not to exceed one-half pint upon a single prescription. Physicians desiring to prescribe alcohol must make affidavit before the judge of the probate court of the county in which said physician practices, stating that he is a duly licensed practitioner and that he will prescribe alcohol in accordance with the provisions of the law which are set forth in the affidavit required to be filed. For this a fee of twenty-five cents is allowed the clerk receiving the affidavit. Prescriptions must be written in accordance with a form prescribed by statute. They must contain the name and address of the physician, the name and address of the patient, the date of issuance, and the number of like prescriptions written for the patient within the preceding twelve months, the disease or malady from which the patient is suffering, and set forth the quantities of dose and method of use or administration. Such prescriptions may be issued only after an actual examination of the patient and a copy signed by the physician must be immediately filed with the probate judge who shall preserve the same and deliver all such prescriptions to the next grand jury for examination. (Act of 1919, No. 7, secs. 5, 6, and 7.)

ARIZONA

There is no provision for the sale of intoxicating liquor or alcohol as a medicine either upon prescription or otherwise except that extracts, remedies, etc., which do not contain more alcohol than is necessary for the legitimate purposes of extraction, solution, or preservation and which contain drugs in sufficient quantity to medicate such compounds and which are sold for legitimate and lawful purposes, may be manufactured and sold. (Laws 1917, Chap. 63, Sec. 2.)

ARKANSAS

A physician may prescribe alcohol only to the sick under his charge when he may deem the same necessary, but before issuing any prescriptions the physician must file with the clerk of the county in which he resides an affidavit certifying that he will not prescribe or furnish any alcohol to any one except when in his judgment it is necessary treatment of the disease with which the patient is at the time afflicted. (Secs. 6028–6029 of Code and Amendments of 1919, Chap. 87, Sec. 17.)

CALIFORNIA

The enforcement code passed by the Legislature in 1911, known as the Wright Act (St. 1921, p. 79), adopts the Volstead Act by reference. It was approved by the voters upon referendum at the election November 7, 1922. Sustained by the Supreme Court of California in Ex parte Burke, decided January 9, 1923.

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COLORADO

Registered physicians may prescribe intoxicating liquor to an amount not to exceed four ounces on numbered forms furnished by the Secretary of State and when issued shall be signed by the physician, giving his true, full name, address, date and hour of issuance, and shall state particularly the disease or malady for which prescribed, and true name and address of the patient and the number and date of previous prescriptions to such persons within the year next preceding. The prescription must be filled within forty-eight hours of its issuance. Only one sale may be made on a single prescription and the pharmacist filling the same must preserve them open to public inspection for at least two years. (Chap. 98, Laws 1915 as amended by Chap. 82, Laws 1917.)

CONNECTICUT

Every physician holding a permit from the United States Government to prescribe spirituous and intoxicating liquors may do so. Penalty for violating the provision of the act. (Acts 1921, Chap. 291, Sec. 4, p. 3277.)

DELAWARE

Physicians must be in good standing in their profession and not addicted to the use of intoxicating liquor or drugs. Must personally make careful examination of the person for whom prescribed. May prescribe pure grain or ethyl alcohol only and copy of prescription must be pasted upon bottle. (Act of 1919, Chapter 239, Secs. 4, 8, and 14.)

FLORIDA

A physician regularly licensed to practice his profession by the State Board of Medical Examiners may prescribe pure alcohol in quantities not exceeding eight ounces at any time for medicinal purposes. To write the prescription the physician must have either a professional knowledge of the case or have made an actual examination of the patient. Prescriptions must be written in substantial compliance with a form set forth in the statutes, can be filled only by pharmacists regularly licensed under the laws of the State, only upon the day of issuance or next succeeding day. Can not be refilled, nor can any one person have more than one such prescription filled in any one day. The prescriptions are required to be preserved as a record by the druggist subject to inspection by officers charged with the enforcement of the law. (Act of 1919, Chap. 7890 (No. 108), p. 238, amending Sec. 5 of Chap. 7736, Acts of 1918; Extra Session.)

GEORGIA

Pure alcohol may be prescribed, but alcohol so prescribed must be so medicated as to render it absolutely unfit for use as a beverage. When dispensed upon prescription the druggist will be held absolutely responsible as to the sufficiency of the medication. (Laws 1919, No. 139, Sec. 4, p. 123.)

IDAHO

There seems to be no provision for prescribing alcohol or liquor in any form for medicinal use. Pharmacists wanting a permit may procure it for compounding medicine, but no provision for prescription as a medicine either in Laws of 1915, Chap.

11, or Laws 1921, Chap. 50, regulating purchase and transportation of alcohol. The later act provides that physicians may purchase for manufacturing, laboratory, or scientific purposes only pure alcohol upon the execution of a verified requisition in quadruplicate before the probate judge of the county upon a form to be furnished by the Secretary of State at cost.

ILLINOIS

Physicians upon obtaining a permit granted by the Attorney General may prescribe liquor except wine, beer, or alcoholic malt liquor after careful physical examination of the patient, in a quantity not to exceed one pint for the same patient within a period of ten days. Such prescriptions can not be refilled. Physicians issuing such prescriptions must keep an alphabetically arranged book to be supplied by the officer issuing the permit which shall show the date of issuance of each prescription, amount prescribed, to whom issued, the purpose or ailment for which issued, and directions for its use, stating the amount and frequency of the dose. (Laws, 1921, Chap. 43, Sec. 8.)

INDIANA

Licensed physicians may prescribe grain or ethyl alcohol only for medicinal purposes. The prescription must contain the name and address of the physician, the kind and quantity of liquor prescribed, the name of the person for whom prescribed, the date on which the prescription is written, and directions for the use of the liquor as prescribed. (Laws, 1917, Chap. 4., Sec. 13, as amended by Laws, 1921, Secs. 2 and 3.)

IOWA

Physicians may procure intoxicating liquor, not including malt liquors, and dispense the same to patients actually sick. They may purchase such liquor from pharmacists who hold a permit from the county auditor authorizing them to sell liquor for medicinal purposes. Citizens not addicted to the use of liquor may purchase liquor for medicinal purposes from pharmacists holding permits to sell for such purposes by making an application to purchase upon a blank required to be kept by permit holders supplied by the county auditor. This request must show the applicant not a minor, must give name, residence, and street number, the amount required and for what use desired. The applicant must be personally known to the permit holder or identified by a subscribing witness to the application.

There appear to be no statutory requirements relative to prescriptions, but the Commissioners of Pharmacy of the State are empowered to make rules and regulations to carry into effect the law. (Code of 1913, Secs. 2386, 2395, and 2401.)

KANSAS

Under Section 5499 of the General Statutes of 1915 wholesalers may sell alcohol to retail druggists for medicinal purposes in quantities of not less than one nor more than five gallons. Also the Bone Dry Act, Chapter 215, Laws of 1917, page 283 contains a similar provision but the retailer must file with the carrier and with the County Clerk a statement showing the date, the quantity, and for what purpose such alcohol is to be used. The statement to the Clerk must be filed within

ten days after delivery. Hospitals may procure alcohol upon the same conditions. There is no provision for the sale of medicinal liquor at retail upon prescription.

KENTUCKY

Physicians may issue and pharmacists may fill prescriptions for intoxicating liquors, under the restrictions of the National Federal law. Every physician who issued prescriptions under the Act shall keep duplicates on file in alphabetical order in his office for two years after the date thereof, to be open to the inspection of the County attorney and Commonwealth attorney of the district. The prescription shall state the name and address of the patient, the druggists to whom addressed; the amount required; that the physician is in personal attendance; that the liquor is necessary in the proper treatment of the ailment and shall show the date and name and address of the physician. (Act of June 30, 1920, Sec. 23, Sec. 2554A, 23 Carrolls Kentucky Statute.)

LOUISIANA

Laws 1921, Act No. 39, for enforcing 18th Amendment, contains no provisions relative to prescribing liquor. State governed by Federal law.

MAINE

There is no provision for the sale of medicinal liquor upon prescription. The Code of 1916, Chap. 20, Sec. 17, makes it unlawful for apothecaries to sell intoxicating liquor.

MARYLAND

No general State provision. (Local option laws certain counties.)

MASSACHUSETTS

No general provisions. In some local option territories pharmacists may sell liquors upon prescription. (Sup. Rev. L., p. 770.)

MICHIGAN

Any physician lawfully practicing in the State may prescribe intoxicating liquors not to exceed eight ounces. The prescription must state the name and address of the patient, full directions for taking or using, the number of prescriptions the physician has given to the patient within the year preceding and that after a special diagnosis that the physician is satisfied that the intoxicating liquors were necessary to the health of the patient. (Acts 1919, No. 53, Sec. 19.)

MINNESOTA

Physicians may prescribe intoxicating liquor not exceeding one pint in ten days for the same patient. The prescription must be written in ink, printed or typewritten. It must state the name and address of the patient, the kind and quantity of liquor, directions for its use and that the illness for which the liquor is prescribed requires its use. The prescription must be signed in ink and show the date of its issuance and delivery. A prescription can not be filled after ten days from the date of its issuance and can not be refilled. (Laws 1919, Chap. 455, as amend., Laws 1919, Ex. Sess., Chap. 65, and Laws 1921, Sec. 7.)

MISSISSIPPI

Physicians may prescribe pure alcohol in quantities not exceeding one-half pint. The prescription must be written in substantial compliance with a form provided by law. It must be filled the day of issuance or the following day and can not be refilled. The physician must make an actual examination of the patient. The pharmacist is required to preserve prescriptions for alcohol and file them at the end of each month with the Clerk of the Circuit Court. (Laws 1908, Chap. 113, Sec. 3.)

MISSOURI

No limitation. Laws of 1919, p. 408.

MONTANA

Physicians regularly licensed, holding permits from the Federal government to prescribe liquor as a medicine may record such permit with the Secretary of State of Montana upon the payment of $2.00. This officer is required to countersign the permit or a certified copy and keep a record thereof whereupon the physician may prescribe not more than one pint of spirituous liquors to be taken internally for use by the same person within a period of ten days. The prescribing of malt liquors containing in excess of one-half of one per centum of alcohol by volume is expressly forbidden. Such prescriptions can be written only after a careful physical examination, or if such examination is found impracticable, then upon the best information obtainable and if the physician in good faith believes that the use of liquor as a medicine by such person is necessary. (Laws 1919, Ex. Sess., Sec. 6.)

NEBRASKA

Regularly licensed physicians may issue prescriptions requiring the use of intoxicating liquors for his own patients provided the other ingredients with which it is mixed or compounded are of such character, and used in such quantities as to render the same unfit for use as a beverage. All such prescriptions shall be on numbered forms, furnished, dated, and signed by the physician issuing, stating specifically the ingredients and the liquor and giving the name of the person for whom the prescription is issued. The pharmacist filling such prescriptions must preserve them as a record subject to inspection by the county attorney and the governor. (Acts of 1917, Chap. 187, Sec. 25.)

NEVADA

Prescription limited to pure grain alcohol. Sec. 4. Law December 16, 1918.

NEW HAMPSHIRE

Physicians may prescribe intoxicating liquor. The prescription may be written in accordance with a form prescribed by law. The prescription must show the name of the patient, the quantity of liquor, the kind, and give directions as to the amount and frequency of the dose. Such prescriptions must be written only after diagnosis of the disease, exercising the same professional skill and care as on prescribing any poisonous or habit-forming drug. The pharmacist filling the same must purchase such medicinal liquor from the State liquor agent who is made responsible for the quality of the liquor supplied to druggists. The druggist must also keep a record

in which the person having the prescription filled must sign, giving his residence address. This record and the prescriptions must be kept open to inspection by enforcement officers. (Laws 1919, Chap. 147, Secs. 2, 10, and 12.)

NEW JERSEY

Physicians in active practice in the State holding permits from the Federal Government may have the same countersigned by the county clerk, whereupon he may prescribe liquor for medicinal purposes, upon compliance with the provisions of the Federal law. (Session Laws 1921, Chap. 150, Secs. 20–b, 28, 29, 44, and 45.)

NEW MEXICO

Pure grain alcohol only may be sold for medicinal use. Article XXIII amending State Constitution and Chapter 16, Laws 1920.

NEW YORK

Mullan-Gage Law 1921, Chap. 155, Sec. 1214. Same restrictions as in Federal Act.

NORTH CAROLINA

Act 1908 allowed all grain alcohol only to be used in compounding, mixing, or preserving medicines or for surgical purposes. Sec. 8 That all laws authorizing or allowing the sale of spirituous, vinous, or malt liquors or intoxicating bitters by any medical depository, druggist, or pharmacist be, and the same are hereby repealed, and it shall be unlawful for any medical depository, druggist, or pharmacist to sell or otherwise dispose of for gain any spirituous, vinous, fermented, or malt liquors or intoxicating liquors. (Law April 1, 1915, Secs. 8 and 9.)

NORTH DAKOTA

No person shall within this state manufacture, sell, barter, transport, import, deliver, export, or furnish any intoxicating liquor or possess the same except as permitted by federal statute. All the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. *Provided* that pure grain or ethyl alcohol for nonbeverage purposes, wine for sacramental purposes; denatured alcohol or denatured rum; medical preparations that are unfit for beverage purposes; patented, patent and proprietary medicines that are unfit for beverage purposes; toilet, medical, and antiseptic preparations and solutions that are unfit for beverage purposes; flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes; or vinegar or sweet cider may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed when permitted by Federal statute. (Law of February 18, 1921, Sec. 2.)

OHIO

A physician holding a Federal permit may within ten days of the receipt thereof file a copy with the Commissioner of Prohibition of Ohio, who is required to keep an indexed record of such permit holders. Thereupon such physician may prescribe pure grain or ethyl alcohol or spirituous liquors in quantities not to exceed one-half pint in any period of ten days, for the aged, infirm, and known sick. (Laws 1921, Secs. 6212–15–2 and 6212–15–b.)

OKLAHOMA

Pure grain alcohol only may be prescribed for medicinal purposes. The governor is authorized to prescribe rules and regulations governing its sale. (Session Laws of 1911 as amended by Laws 1913, Chap. 70, Sec. 1; Comp. St. 1921, Sec. 6982.)

OREGON

Physicians may prescribe ethyl alcohol only upon prescription, if a licensed physician in good standing, actually engaged in the practice of his profession. The prescription must be dated the actual date of issuance. They must be numbered consecutively during each calendar month, the number of each prescription to appear plainly upon its face. It must show the general nature of the ailment, the name and address of the patient and of the physician, and must be written in duplicate and on or before the tenth of each calendar month carbon copies must be filed with the clerk of the county, of all prescriptions issued during the month, together with an affidavit certifying that the prescriptions filed constitute a full report of all alcohol prescribed during the month. Provision is also made whereby the physician may procure and administer alcohol to patients in certain cases, but not to be sold by such physician. (General Laws 1917, Chap. 40, Sec. 2.)

PENNSYLVANIA

No provisions of State law.

RHODE ISLAND

No physician shall prescribe except upon obtaining a Federal permit. (Acts 1922, Chap. 2231, Sec. 4.)

SOUTH CAROLINA

Pure alcohol only may be prescribed in quantities not exceeding one-half pint. The physician must write his prescription in substantial compliance with a form set forth in the statute. Such physician must be a regular practicing physician of the State. He must make an actual examination of the patient and may prescribe alcohol only when in his professional judgment the use of such alcohol is absolutely necessary to alleviate or cure the disease from which the patient is suffering. Such prescription can be filled only upon the day of issuance or the following day and may not be refilled nor can they be filled at any drug store in which the physician is financially interested. The alcohol can be delivered by the druggist only to the patient or to someone authorized by the physician to receive it, except in the case of minors, in which event it may be delivered to the parent or guardian of such minor. Prescriptions must be preserved by the druggist, recorded, and indexed, and at the end of each calendar month filed with clerk of the court of the county in which such drug store is located. The record and prescriptions are required to be kept subject to inspection by the enforcement officers. (Criminal Code of 1921, Secs. 797, 798, and 802.)

SOUTH DAKOTA

Physicians in active practice, of good moral character, may make application to the State Sheriff for a permit to prescribe spirituous or vinous liquors. That officer may in his discretion grant such permit upon the payment of a fee of one dollar. For violation of the terms of the permit the State Sheriff may revoke such permit in which event the physician may,

appeal to the appeal board, consisting of the Governor, Attorney General, and State Sheriff. (Sec. 10255, Revised Code of 1919.) Prescriptions for spirituous and vinous liquor must be written in ink, indelible pencil, or on a typewriter, shall be signed by the physician, and shall have on it the number of the physician's permit, the date of issuance, the name of the patient, that it is needed for actual sickness, the name of the ailment or disease, the kind and quantity of liquor prescribed, the dose, the number of prescriptions written for the same patient, and the total amount prescribed during the preceding three months. The physician must retain a carbon duplicate and on the original must stamp the word "Original" and upon the carbon the word "Copy." Each prescription must be in numerical order, and the number on the carbon must correspond with that on the original. The physician must also keep a record of such prescriptions showing the name and residence of the patient, the date filled, the kind of liquor prescribed, the quantity, the disease, and total quantity prescribed by him for such patient during the preceding three months. This record to be open to inspection during business hours by enforcement officials. On or before the 5th of each month duplicate copies of this record with the carbon copies of the prescriptions, together with an affidavit certifying the same constitute a true, full, and correct statement of all prescriptions issuing during the month, must be filed with the county auditor, who shall file one record in his office and forward them to the State Sheriff. (Revised Code of 1919, Secs. 10273, 10274, and 10275.)

TENNESSEE

Physicians of good standing actually engaged in the practice of the profession and not of intemperate habits may prescribe alcohol only in quantities not exceeding one pint for medicinal use. Such prescriptions may not be filled after three days of the date of issuance, must be written in triplicate, contain the name of the patient, the address, directions for use, must be signed by the physician, and give his address. The physician is required to keep one copy of such prescription for a period of two years and on or before the eighth day of each month must mail one copy of all such prescriptions issued by him during the previous calendar month to the Pure Food and Drug Department of the State. The druggist is also required to keep a record of all such prescriptions filled. Such records are to be kept open to the inspection of enforcement officers. (Laws 1917, Chap. 68, Secs. 4, 5 and 6.)

TEXAS

Physicians may prescribe pure alcohol only in quantities not exceeding one pint. In order to do so the physicians must secure a permit from the Comptroller of Public Accounts for which a fee of five dollars is charged. That officer is required to furnish at cost to the physician the necessary prescriptions and record books. The prescriptions are required to be in book form numbered serially from one to one hundred and each book to be given a number with a stub carrying the corresponding number and data as the prescription bearing that number. The book containing the copy of such stub must be returned to the Comptroller of Public Accounts

along with all defaced blanks written six months after the date of delivery of such book. Physicians must make a careful, personal, physical examination of the patient before issuing such a prescription, which is valid only when written upon the prescribed form. No such prescription may be filled at any drug store in which such physician has any financial interest. Physicians issuing prescriptions for alcohol must preserve a record of such prescriptions, a copy of which record must be filed with the Comptroller of Accounts not later than the fifth day of the month for the quarter preceding. (Act 1919, 36 Legislature 2nd Called Session, Chap. 78, Sec. 13, 14 and 19; Penal Code 1920. Chap. 6-A.)

UTAH

No physician may prescribe any compound containing in excess of one-half of one per centum of alcohol by volume which is capable of being used as a beverage, or prescribe any medicine containing total content of such prescription more than four ounces of alcohol and such prescription may not be refilled within seven days. (Sec. 3370 Comp. Laws of 1917, p. 687, being Sec. 30 of laws of 1917, Chap. 2.)

VERMONT

Provides that physicians holding permits from the Federal Government to prescribe liquor for medicinal use may within ten days of the receipt of such permit file a copy thereof with the Secretary of State whereupon such physician may prescribe liquor as a medicine upon the limitation of the Federal Law. (Secs. 4 and 5, Session Laws 1921, No. 204.)

VIRGINIA

Under the State law physician prescribes not exceeding two quarts of alcohol, or one gallon of malt or vinous liquors, or one quart of brandy or whiskey. (Acts of 1918, Chap. 388, Secs. 8–c 13.)

WASHINGTON

No provision made for the issuance of prescriptions for intoxicating liquors or alcohol. Licensed physicians may procure alcohol upon securing a permit from the county auditor and may administer the same to their patients, but it is unlawful for a physician to administer diluted alcohol or adulterated alcohol, or alcohol compounded with any other substance, in such proportion that it shall be capable of being used as a beverage and no prescription can be issued for alcohol to be diluted or adulterated or compounded with any other substance in such proportions that it shall be capable of being used as a beverage. (Sec. 2, Sessions Laws of 1917, Chap. 19.)

WEST VIRGINIA

The law of 1921 provides for the sale by druggists through pharmacists of pure grain alcohol for medicinal purposes and provides that physicians may use the same in the practice of their profession subject to the provisions of the Federal law and the regulations issued thereunder. (Act of May 2, 1917.)

WISCONSIN

Physicians may prescribe intoxicating liquor upon the condition and limitation of the Federal law provided such physician shall make application to the State Prohibition Commissioner and obtain a permit for which a fee of ten dollars is charged to be paid into the general fund of the State Treasury. (Laws 1921, Secs. 7-b and 9.)

WYOMING

Physicians may prescribe spirituous liquors to be taken internally in quantities not exceeding one pint for the same patient within a period of ten days. The physician must make application to the State Commissioner of Law Enforcement and obtain a permit to prescribe, which permits are in force for a period of one year unless revoked for violation of the law. The physician must make a careful physical examination of the patient, or if this is found impracticable, then upon the best information obtainable, if he in good faith believes that the use of liquor by such patient as a medicine is necessary and will afford relief for some known ailment he may issue such a prescription. The physician must keep a record alphabetically arranged of all prescriptions for liquor. Laws of 1921, Chap. 117, Secs. 5, 6, and 7. Language same as that of original Volstead Act would probably receive same construction. (See 32 Op. Att. Gen. 467.)

Appendix B

State court decisions interpreting state statutes limiting physicians' right to prescribe beverage liquor

There are numerous decisions by State courts upholding the constitutionality of rigorous restrictions upon prescriptions of beverage intoxicants. Indeed, the successive statutes in the experienced prohibition States are conclusive proof not only of the existence of the power and the approval by State courts of its use, but of the absolute necessity of its exercise if the prohibition against the use of liquors as a beverage is to be made effective.

KANSAS

An instance of this is to be found in the statute of the State of Kansas. In this State the original prohibition law (Laws of 1881, Ch. 128, Sec. 1) provides:

> Any person or persons who shall manufacture, sell, or barter any spirituous, malt, vinous, fermented, or other intoxicating liquors, shall be guilty of a misdemeanor, and punished as hereinafter provided: *Provided, however*, that such liquors may be sold for medical, scientific, and mechanical purposes, as provided in this act.

The Constitution of Kansas (Art. 15, Sec. 10) is similar to the Eighteenth Amendment and prohibits the "manufacture and sale of intoxicating liquors * * * except for medical, scientific, and mechanical purposes."

In 1909 by Sections 1 to 4 of Ch. 164 of the General Statutes the prohibition law was amended and the exceptions in favor of the sale of intoxicating liquor for scientific, mechanical, and medical purposes were eliminated.

By Chapter 178 of the Laws of 1911 the Act was further amended to provide that wholesale druggists of a certain class might sell alcohol for medicinal, scientific, and mechanical purposes to registered pharmacists in good faith in the retail drug business in quantities of not less than one gallon and not more than five gallons.

This statute was assailed on the ground that the legislature had no power to prohibit the use of intoxicating liquors for medicinal purposes when the Constitution provided that it might be used for such purposes.

In *State* v. *Weiss*, 84 Kansas, 165 (decided 1911), this statute was declared to be constitutional, the court saying (p. 166):

> It is argued that the constitutional prohibition * * * is equivalent to a mandate directing the legislature not to interfere with such manufacture and sale for the three excepted purposes. But we regard the amendment as a prohibition upon personal conduct, not upon legislative action.

See also *State* v. *Miller*, 92 Kans. 994 (decided 1914), where the court said (pp. 1000–1003):

> In 1909 the legislature passed a new act which extended the prohibition of the law to the manufacture and sale of intoxicating liquors for medical, scientific, and mechanical purposes, and which superseded the old definition of intoxicating liquors. * * *
>
> In 1909 the small remedial value of alcoholic stimulants as compared with the former popular notion regarding their curative properties had been established. The pathway to inebriety through the use of patent and other medicines, consisting of intoxicating liquor containing some barks or drugs or roots or seeds

> having more or less medicinal property, had been unmasked * * *. None of the social disasters which had been predicted as results of the law of 1881 had befallen the State. Fear lest the law might be brought into disrepute by encroachment on the right to use preparations containing alcohol was no longer entertained. Nearly thirty years' experience disclosed that restraints, which year by year had been continually imposed and which would have been regarded as unnecessary and unreasonable when the law was new and strange, were fit and wholesome and were approved by public sentiment.

In 1917, Kansas enacted the Bone Dry Law, so called, which prohibits the sale of anything except alcohol for medicinal purposes and limits such sales to druggists, hospitals, and institutions authorized to receive them. No provision is made for dispensing upon prescription.

This Act was again declared constitutional in *State* v. *Macek*, 104 Kans. 742, where the court in rather enthusiastic language said (pp. 745–746):

> We come, then, to the last and only serious question in this lawsuit—the constitutionality of the "bone-dry" law. Appellant says that it is unconstitutional and void, and cites many a respectable authority and precedent from Blackstone's time down to yesterday to that effect. But they all stop yesterday. The times change. Men change, and their opinions change; their notions of right and wrong change. The United States, its government and people, have come a long, long way since the Washingtonian society was organized in 1840 to combat intemperance. A whole generation of Americans has been born and educated, and has grown to maturity and taken its dominant place in the electorate

and in official life, since instruction in the evil effects of intoxicants upon the human system became compulsory in our public schools. (Laws 1885, ch. 169; Gen. Stat. 1915, Sec. 9034.) That is the leaven which has leavened the whole lump. "Learn young, learn fair," is an old adage whose efficacy was never better proved than in the practical annihilation of the liquor traffic by the unnoticed, but persistent, work of the public schools for the last thirty years. While we of an earlier generation continued to argue the pros and cons of the liquor traffic, and the wisdom, or folly, or impossibility, of suppressing the sale and use of intoxicants, a generation arrived which will have none of it; that generation has said so as clearly and emphatically as the American people ever voiced their determination on any subject since 1776. (XVIII amendment to U. S. Const.) And because of the ease with which the law prohibiting sales, etc., of liquor may be violated and the difficulty of procuring evidence of such violation, the legislature in 1917 (Laws 1917, ch. 215) decreed that the mere possession of intoxicants, or knowingly to permit them to be kept on one's premises, should be unlawful. Any legislature sincerely determined to suppress the sale of liquor and to suppress the keeping of tippling nuisances, would be strongly persuaded to go the final step of forbidding the mere possession of intoxicants; otherwise its laws forbidding liquor sales and the existence of drinking dens would be bound to be somewhat ineffective. The whole matter is one of public policy. And the public policy of a state must largely be shaped by legislation. No federal or state constitutional inhibition was violated in the enactment of the "bone-dry" law, all of yesterday's juristic dissertations and precedents to the contrary notwithstanding.

That the regulation and prohibition of the use of intoxicating liquors for medicinal purposes has a substantial relation to the prohibition of intoxicants for beverage purposes and is within the constitutional powers of a State under a constitutional provision similar to the one here in question, seems moreover to have been directly decided in the case of *State* v. *Durein*, 70 Kans. 1, affirmed 208 U. S. 613. In that case there was a conviction under the prohibition laws of the State for maintaining a nuisance. The court said (pp. 11–13):

> The constitutionality of the law regulating the sale of intoxicating liquor in this State is assailed, and the argument is made that the sale of liquors for medical, mechanical, and scientific purposes is a lawful and virtuous business, necessary for the welfare of the community; that permits to carry on such business must, therefore, be obtainable as a matter of right; that the statute gives to probate judges an arbitrary and unrestrained authority to refuse permits for such purposes; that the vesting of such power in probate judges renders the statute void, and hence that no one can be punished for selling liquors without a permit. The opinion of the supreme court of the United States in the case of *Mugler* v. *Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, effectually disposes of this argument. Mr. Justice Harlan there shows, both by reason and upon authority, that the right to manufacture, sell, and use articles of trade is conditioned upon the fact that such conduct does not deleteriously affect the rights of the public; that if any business becomes prejudicial to the welfare of the community, society has the right to protect itself against such injurious consequences; that the legislature of the State has the right to determine what measures are

> appropriate or needful for the protection of the public morals, health, and safety, and unless a statute has no real or substantial relation to those objects the courts can not interfere. It is then shown that if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage would tend to cripple or defeat the effort to guard the community against the evils attending the excessive use of such liquors prohibition may follow. So, if the manufacture and sale of liquors for medical, mechanical, and scientific purposes merely opens the door to the train of evils following upon the general use of intoxicants, they may be prohibited; and *since they may be prohibited, they may be regulated in the manner prescribed by the statutes of this State.* (Italics ours.)

This decision was followed by the subsequent case of *State* v. *Kurent*, 105 Kans. 13, where the constitutionality of the statute was reaffirmed. It must be borne in mind that this is the status of law in a State where the State constitutional provision reads:

> The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific, and mechanical purposes.

TENNESSEE

The Legislature of Tennessee by Acts of 1909, Chap. 10, prohibited the sale of intoxicating liquor as a beverage and prohibited the manufacture of all alcoholic liquor except alcohol of 188 proof. The effect of this statute was to prohibit the manufacture of all liquors except alcohol of 188% proof. No whiskey, beer, wine, or other intoxicants could be manufactured in the State no matter whether in-

tended for medicinal, mechanical, scientific, sacramental or other purposes. The contention was made in the case of *Motlow* v. *State*, 125 Tenn. 547, that this was an unjust and unreasonable discrimination against the manufacture of liquors designated for nonbeverage use.

The Court held, *inter alia:*

> No unconstitutional discrimination is made against local manufacturers in favor of those of other States, by forbidding the manufacture of intoxicating liquors within the State while permitting their sale for certain purposes, although the result is to require those sold to be secured outside the State.
>
> The legislature may constitutionally forbid the manufacture of intoxicating liquors within the State while permitting their sale for medicinal and other nonbeverage purposes.
>
> There is no property right in the manufacture of intoxicating liquors which can not be taken away under the police power of the State, although such liquors are capable of harmless use.

On appeal to this court the case was dismissed, 239 U. S. 653.

RHODE ISLAND

In 1886 Rhode Island adopted an amendment to the Constitution of that State which in its wording was very similar to the language of the Eighteenth Amendment. In the case of *State* v. *Kane*, 15 R. I. 395, the question of the relation of the amendment to nonbeverage liquor was before the Supreme Court of that State. It was held, quoting from the syllabus:

> A constitutional amendment provided, "The manufacture and sale of intoxicating liquors, to be used as a beverage, shall be prohibited.

> The General Assembly shall provide by law for carrying this article into effect."
>
> *Held*, that this constitutional provision did not limit the power which the General Assembly previously had to enact prohibitory laws.
>
> *Held*, further, that nothing in this constitutional provision gave the right to manufacture and sell intoxicating liquors to be used otherwise than as a beverage.

In construing the second clause of the amendment, which conferred power upon the legislature to make the prohibition effective, the court said (p. 397):

> Of course, if the General Assembly had previously had no power to legislate on the subject, this command would confer by implication the power required for its own execution.

While the court recognized that under its police power the state would have had the power to prohibit the sale of liquors for beverage purposes in the absence of a constitutional provision, it was careful to point out that even in the absence of such pre-existing authority where the right was conferred by a constitutional provision *there was conferred by necessary implication the power required for its execution.*

The Supreme Court of Rhode Island reaffirmed this view in the case of *State* v. *Kennedy*, 16 R. I. 409, where it said:

> In *State* v. *Kane*, 15 R. I. 395, we carefully considered the point here raised, and expressed the opinion that while the fifth amendment to the Constitution, commonly called the prohibitory amendment, makes it obligatory on the General Assembly to enact laws to prevent the sale of intoxicating liquors "to be used as a beverage," it does not take away from the General Assembly, either expressly

> or by implication, the power which it previously had to restrict the sale for other purposes to certain persons or classes of persons; but rather, on the contrary, makes it their duty to impose such a restriction, if, by so doing, they can the more effectually prevent the selling and keeping for sale for *use as a beverage*. We remain of the opinion there expressed.

IDAHO

In the case of *In re Crane*, 27 Idaho, 671, the Supreme Court of Idaho, in construing the law of that State (Sess. Laws 1915, Ch. 11) said (pp. 679–680):

> The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and pure alcohol to be used for scientific or mechanical purposes, or for compounding or preparing medicine, so that the possession of whiskey, or of any intoxicating liquor, other than wine and pure alcohol for the uses above-mentioned, is prohibited.
>
> * * * * *
>
> No fixed rule has been discovered by which to determine whether or not a statute of the nature of the one under consideration is a proper exercise of the police power, but it may be said the questions propounded to the courts are: Does the statute purport to have been enacted to protect the public health, the public morals, or the public safety? Has it a real and substantial relation to those objects, or is it, upon the other hand, a palpable invasion of rights secured by the constitution? Questions as to the wisdom and expediency of such legislation address themselves to the legislative, not to the judicial branch of the government.

Again (p. 687):

> We have reached the conclusion that this act is not in contravention of sec. 1 of the 14th amendment to the constitution of the United States, nor of sec. 13, art. 1, of the constitution of Idaho that it was passed by the legislature with a view to the protection of the public health, the public morals and the public safety; that it has a real and substantial relation to those objects, and that it is, therefore, a reasonable exercise of the police power of the state.

The validity of the statute was sustained by this Court in *Crane* v. *Campbell*, 245 U. S. 304. After repeating the language of the lower court it pointed out that the only exceptions made to the prohibitions of the statute was in the case of wine to be used for sacramental purposes and pure alcohol to be used for scientific and mechanical purposes or for compounding or preparing medicine. This Court said (pp. 307–308):

> It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. * * *
>
> As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. * * * And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was

arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.

ARIZONA

The constitution of one State, namely, Arizona, as construed by the Supreme Court of that State, prohibits the prescribing of either alcohol or any form of intoxicating liquors. Art. XXIII of the Constitution was construed by the Supreme Court of that State in the case of *Cooper* v. *State*, 19 Ariz. 486. The court said (p. 487):

> The Constitution forbids the sale and disposition of ardent spirits, ale, beer, and wine, and of intoxicating liquors of any kind to any person in the State of Arizona. Article 23, Constitution. It contains no exceptions, as that it may be prescribed and sold as a medicine, or for medicinal purposes. Neither doctors nor druggists, nor anyone else, may sell or dispose of any of the named or described liquors as such, or when compounded as a medicine. It is not a regulatory provision, but one of outlawry. It is one of suppression, and not one of supervision. The fact that ardent spirits are mixed with other ingredients and, as thus compounded, labeled Jamaica ginger and sometimes used for medicinal purposes, does not change the situation.

CALIFORNIA

The entire question of the right to prohibit or regulate the prescribing of liquor for medicinal purposes, including the validity of the provisions of the National Prohibition Act here in question, has recently been the subject of a careful review by the District Court of Appeals in the case of *In re Hixson*, 61 Cal. App. 200 (214 Pac. 677, decided Febru ry 28,

1923). This case, a habeas corpus proceeding, involved the validity of the Gandier Ordinance of Los Angeles. This ordinance, enacted prior to the adoption of the Eighteenth Amendment, provided that pharmacists might fill prescriptions for alcoholic liquors in a quantity not exceeding one-half pint upon a single prescription. It was contended that the ordinance, when read in connection with the provisions of the National Prohibition Act, in effect limited the filling of prescriptions for the same patient to 8 ounces (one-half pint) of spirituous or vinous liquors within ten days, whereas the Federal law permitted one pint of such liquors within this period. It was alleged that the ordinance was unconstitutional because in conflict with the Eighteenth and Fourteenth Amendments and the National Prohibition Act. In upholding the validity of the ordinance the court said (pp. 204–206):

> Therefore it is claimed that the practical effect of the combined operation of the national act and the city ordinance is to make it unlawful for a licensed pharmacist in the city of Los Angeles to sell to any one person, on a physician's prescription, more than eight ounces of alcoholic liquor in any period of ten days, which amount, it is claimed, is so small as to be valueless for medicinal purposes. Assuming, without conceding, that such is the result of the operation of the city ordinance and the national law, we still do not think that the ordinance has been rendered unreasonable. For reasons presently to be stated, we think that the ordinance would not have been unreasonable and void if it had entirely prohibited the sale of alcoholic liquor as a medicine. And if the city possessed the power entirely to prohibit its sale as a medicine, then,

a fortiori, the limitation to eight ounces in ten days would not have been an unreasonable restriction.

* * * * *

If wine, whiskey, brandy, and the like are useful for medicinal and other nonbeverage purposes, still the evils which flow from their use as a beverage so greatly menace the health, peace, morals, and safety of society that the lawmaking branch of the government may with reason regard those evils as overwhelmingly outweighing the good services which such liquors may perform as medicines. If experience shows that the sale of intoxicating liquors for medicinal purposes opens the door to that train of evils which admittedly follows upon their general use as beverages, then why may not their use as medicines be absolutely prohibited? That the sale of such liquors for medicinal purposes does greatly facilitate the evasion of the whole scheme of prohibitory legislation is a matter of common notoriety. A city's entire scheme of prohibition might fail if pharmacists were to be permitted to sell alcoholic liquors for medicinal use. And because this is so, the city of Los Angeles, had it deemed it wise and expedient, could have forbidden the sale of such liquors as medicines even though such sales, regarded as separate transactions, might be entirely innocuous.

The fallacy of petitioner's position lies in the assumption that if an article is useful for any purpose its sale can not be wholly forbidden. But notwithstanding an article may be useful for some purposes, its harmfulness to the public from its general use may be so great and widespread and its secret disposition may be so difficult to prevent that the legislature, to protect the public, may absolutely

> forbid its manufacture or sale, or both, so as effectually to root out its evil effects altogether.

And again (p. 213):

> Concluding, as we do, that the city of Los Angeles, had it chosen to exercise the power, might have prohibited in the first instance all sales of alcoholic liquor as a medicine, it can not be held that the city's restriction upon the filling of prescriptions by pharmacists has been so far augmented by the national prohibition law that it has now become unreasonable and void.

The case came to this Court on writ of error under the title of *Hixon* v. *Oakes*, 265 U. S. 254. In dismissing the case this Court said (p. 256):

> Neither the Eighteenth Amendment nor the Volstead Act grants the right to sell intoxicating liquors within a State. And certainly nothing in that act lends color to the suggestion that it endows a pharmacist with the right to dispense liquors for which he may claim the protection of the Fourteenth Amendment.

This Court was careful to point out that its decision was predicated upon the proposition that, notwithstanding that law recognized spirituous liquors as a medicine and the effect of the ordinance and the Volstead Act was to limit the quantity of liquor which could be obtained upon prescription for medicinal purposes to one-half pint within ten days, it did not violate any constitutional right.

The effect of this ordinance as construed by the California court was to recognize spirituous liquors as a medicine but to impose limitations even more restrictive than those provided in the Volstead Act. The action of the California court in sustaining this

legislation as valid under the Eighteenth Amendment was upheld by this Court in denying the writ of habeas corpus on the grounds that no Federal right was violated. The reasoning of this Court in the *Hixon case* is controlling in the instant case. The fact that the *Hixon case* involved a municipal ordinance while the instant case involves a Federal statute to enforce the Eighteenth Amendment in no way alters the result.

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AUTHORITIES CITED.

MISCELLANEOUS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 301

SAMUEL W. LAMBERT, *Appellant*,

vs.

EDWARD C. YELLOWLEY, AS ACTING FEDERAL PROHIBITION DIRECTOR; DAVID H. BLAIR, AS COMMISSIONER OF INTERNAL REVENUE, AND EMERY R. BUCKNER, AS UNITED STATES ATTORNEY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICI CURIAE

On Behalf of Respondents

Agreeable to the permission of the court this brief is filed as Amici Curiae in the hope that some of the reasons and authorities cited may prove helpful in the consideration of the question of law involved. The case involves the power of Congress to regulate the

prescribing of intoxicating liquors under the Eighteenth Amendment and incidentally the power of the states in the same respect under the concurrent power clause of the Eighteenth Amendment.

STATEMENT OF FACTS

This is an appeal from the judgment of the U. S. Circuit Court of Appeals of the Second Circuit reversing the judgment and directing the dismissal of an injunction issued by the District Court for the Southern District of New York upon a bill filed by the petitioner, a licensed practicing physician of New York, seeking to enjoin the Commissioner of Internal Revenue and the U. S. District Attorney from enforcing against him the limitations upon the quantity of intoxicating liquor which he as a physician might prescribe, imposed by the National Prohibition Act and Supplemental Prohibition Act, upon the grounds that said statutes are unconstitutional.

QUESTION OF LAW INVOLVED

The Constitutional power of Congress under the Eighteenth Amendment to enact the provisions of the National Prohibition Act, Section 7, Title II, limiting the quantity of spirituous liquor which a physician may prescribe for internal use by the same person to one pint within ten days and the similar limitation with reference to vinous liquor, in Section 2 of the Supplemental Prohibition Act of November 23rd, 1921, that: "No physician shall prescribe * * * on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall anyone prescribe * * * on any prescription more than one-fourth of one gallon of vinous liquor, or any such

vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighteenth Amendment to United States Constitution (Appendix, p, 35).

Sec. 7, Title II, of National Prohibition Act, October 28, 1919 (41 Stat. L. 305) Appendix, p. 35.

Sec. 2. Supplemental Prohibition Act, November 23, 1921 (42 Stat. L. 222) Appendix, p. 36.

ARGUMENT

THE POWER OF CONGRESS UNDER THE EIGHTEENTH AMENDMENT TO PROHIBIT THE PRESCRIBING OF CERTAIN KINDS OF INTOXICATING LIQUORS AND TO REGULATE THE PRESCRIBING OF OTHER KINDS CONCLUSIVELY SETTLED BY THE DECISIONS OF THIS COURT.

This Court in Everard's Breweries v. Day, 265 U. S. 545, in a unanimous opinion sustained the constitutionality of the Supplemental Prohibition Act prohibiting, absolutely, the prescribing of intoxicating malt liquors for medicinal purposes. In this case this Court laid down the following principles regarding the power of Congress to enact appropriate legislation to enforce the Eighteenth Amendment, saying:

> "By its terms the Amendment prohibits the manufacture, sale, or transportation of intoxicating liquors for beverage purposes, and grants to

> Congress the power to enforce this prohibition 'by appropriate legislation.' Its purpose is to suppress the entire traffic in intoxicating liquor as a beverage. See Grogan v. Walker, 259 U. S. 88-89. And it must be respected and given effect in the same manner as other provisions of the Constitution. National Prohibition Cases, 253 U. S. 350-386.

It is clear that Congress has the undoubted right and power of suppress every phase of the beverage liquor traffic, and to that end it may enact appropriate legislation to accomplish that purpose. The court further held:

> "Congress is not limited to such measures as are indispensably necessary to give effect to its express powers, but, in the exercise of its discretion as to the means of carrying them into execution, may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished, and consistent with the letter and spirit of the Constitution."

In the above statement and the long list of citations given, it is established beyond a doubt that Congress is given the largest possible latitude in the exercise of its discretion for making the Eighteenth Amendment effective and enforceable. That Congress did not go beyond any reasonable limit in regulating the prescribing of spirituous and vinous liquors is shown by the laws of the various states dealing with this subject. In fact, the act of Congress is not as strict or drastic in many of its provisions as the state laws. This court further said in that case, p. 559:

> "It is likewise well settled that where the means adopted by Congress are not prohibited and are

calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity, as this would be to pass the line which circumscribes the judicial department, and to tread upon legislative ground."

The means adopted by Congress for regulating the prescribing of spirituous and vinous liquors are not only not prohibited but they are clearly calculated to effect the object entrusted to it. If Congress did not have the power to deal with beverage whisky used for medicinal purposes the whole purpose of prohibition could be thwarted by the practice of unscrupulous physicians in communities prescribing intoxicating liquors which could be used for beverage purposes. This Court in the Everards case (supra) said, p. 560:

> "It is clear that Congress, under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes, may adopt any eligible and appropriate means to make that prohibition effective. The possible abuse of a power is not an argument against its existence."

This recent decision of the Court, like the decision in the Webb-Kenyon Interstate Liquor shipment case, James Clark Distilling Co., v. Western Maryland R. Co., 242 U. S. 311-332, makes clear that a possible abuse of a power is not an argument against its existence. Chief Justice White well said in that case:

> "The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guarantees of the Constitution but for the enlarged right possessed by government to regulate liquor has never, that

we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace."

There is no abuse of this power in the instant case. The steady growth of the number of permits and the large amount of whisky prescribed for beverage use in the small section of this country since the National Prohibition Act went into effect indicates clearly what would appear if this barrier were removed.

MORE RESTRICTIVE LIMITATIONS UPON PRESCRIBING OF LIQUOR HAVE BEEN HELD CONSTITUTIONAL BY UNITED STATES SUPREME COURT UNDER EIGHTEENTH AMENDMENT.

The question which is raised in this case has already been decided by the United States Supreme Court adversely to the contention of the petitioner. The specific question of the authority of legislative bodies under the Eighteenth Amendment to impose limitations upon the prescribing of liquors for medicinal purposes was considered by the Supreme Court of the United States in the case of Hixson vs. Oakes, decided May 26, 1924, 265 U. S. 254. This case involved the validity of the Gandier ordinance of Los Angeles, California.

This ordinance, enacted prior to the adoption of the

Eighteenth Amendment, provided that pharmacists might fill prescriptions for alcoholic liquors in a quantity not exceeding one-half pint upon a single prescription. No limitation was fixed concerning the frequency of issuance. The National Prohibition Act, Title II, Section 7, and Supplemental Prohibition Act of Nov. 23, 1921, section 2, provide that not more than one pint of spirituous or vinous liquors may be prescribed for the same patient within a period of ten days. *It was contended that the ordinance, when read in connection with the provisions of the National Prohibition Act, in effect limited the filling of prescriptions for the same patient to 8 oz. (½ pint) of spirituous or vinous liquors within ten days—whereas the Federal law permitted 1 pint of such liquors within this period.* It was alleged that the ordinance was unconstitutional because in conflict with the Eighteenth and Fourteenth Amendments. The District Court of Appeals, Second District, Division 2, California, in Ex Parte Hixson, 214, p. 677, upheld the validity of the ordinance, saying:

> "* * * It is claimed that the practical effect of the combined operation of the national act and the city ordinance is to make it unlawful for a licensed pharmacist in the city of Los Angeles to sell to any one person, on a physician's prescription, more than eight ounces of alcoholic liquor in any period of ten days which amount, it is claimed, is so small as to be valueless for medicinal purposes. Assuming, without conceding, that such is the result of the operation of the city ordinance and the national law, *we still do not think that the ordinance has been rendered unreasonable.*" (italics ours.)

"If wine, whiskey, brandy, and the like are useful for medicinal and other non-beverage purposes, still the evils which flow from their use as a beverage so greatly menance the health, peace, morals, and safety of society that the lawmaking branch of the government may with reason regard those evils as overwhelmingly outweighing the good services which such liquors may perform as medicines. If experience shows that the sale of intoxicating liquors for medicinal purposes opens the door to that train of evils which admittedly follows upon their general use as beverages, then why may not their use as medicines be absolutely prohibited? That the sale of such liquors for medicinal purposes does greatly facilitate the evasion of the whole scheme of prohibitory legislation is a matter of common notoriety. A city's entire scheme of prohibition might fail if pharmacists were to be permitted to sell alcholic liquors for medicinal use. And because this is so, the city of Los Angeles, had it deemed wise and expedient, could have forbidden the sale of such liquors as medicines, even though such sales, regarded as separate transactions, might be entirely innocuous.

"The fallacy of petitioner's position lies in the assumption that, if an article is useful for any purpose, its sale cannot be wholly forbidden. But, notwithstanding an article may be useful for some purposes, its harmfulness to the public from its general use, may be so great and widespread and its secret disposition may be so difficult to prevent, that the legislature, to protect the public, may absolutely forbid the manufacture or sale, or both, so as effectively to root out its evil effects altogether." (See also cases cited therein.)

The case was brought on writ of certiorari to the United States Supreme Court. Mr. Justice McReynolds, in speaking for this court, declared:

"Neither the Eighteenth Amendment nor the Volstead Act, grants the right to sell intoxicating liquors, within a state, and certainly nothing in that Act lends color to the suggestion that it endows a pharmacist with the right to dispense liquors for which he may claim the protection of the Fourteenth Amendment." (italics ours.)

The California Court, in this case, was careful to point out that its decision was predicated upon the proposition that, notwithstanding the law recognized liquor as a medicine and the effect of the ordinance and the Volstead Act was to limit the quantity of liquor which could be obtained upon prescription for medicinal purposes to one-half pint within ten days. It did not violate any constitutional right.

The effect of this ordinance as construed by the California Court was to recognize spirituous liquor as a medicine but to impose limitations even more restrictive than those provided in the Volstead Act. The action of the California Court in sustaining this legislation as valid under the Eighteenth Amendment was upheld by this Court in denying the writ of habeas corpus on the grounds that no Federal constitutional right was violated. The reasoning of this Court in the Hixson case is controlling in the instant case. The fact that the Hixson case involved a municipal ordinance, while the instant case involves a Federal act to enforce the Eighteenth Amendment, in no way alters the result.

POWER OF CONGRESS TO ENFORCE EIGHTEENTH AMENDMENT IS THE SAME AS THE POLICE POWER OF STATES TO PROHIBIT BEVERAGE INTOXICANTS.

It is now well settled by the decisions of the United States Supreme Court that the power of Congress to effectively prohibit the manufacture and sale of beverage liquors under the Eighteenth Amendment is as full and complete as the police power of the state to enforce such prohibition.

The character and extent of the power conferred upon Congress by the Eighteenth Amendment was the precise issue before the Supreme Court in the National Prohibition Cases, 253 U. S. 350.

The Eighteenth Amendment prohibits the manufacture and sale of intoxicating liquors. Congress in the National Prohibition Act had defined that term to include beverages containing as much as one-half of one per cent of alcohol by volume. It was insisted that the statute prohibited the manufacture and sale of beverages which were not in fact intoxicating and that because of this the statute was unconstitutional. The Court held:

> "Congress did not exceed its powers, under U. S. Const., 18th Amend., to enforce the prohibition therein declared against the manufacture, sale, or transportation of intoxicating liquors for beverage purposes, by enacting the provisions of the Volstead Act of October 28, 1919, wherein liquor containing as much as one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, are treated as within that power."

It was also insisted that Congress had exceeded the authority conferred by the Amendment by making the prohibition apply to liquors manufactured prior to

the date upon which the Amendment became effective. This Court said:

> "The power of Congress to enforce the Prohibition Amendment to the Federal Constitution may be exerted against the disposal for beverage purposes of liquors manufactured before the Amendment became effective, just as it may be against subsequent manufacture for those purposes."

Even prior to the granting of an express Constitutional power over the subject of intoxicating liquors when Congress legislated upon the subject as an incident of some other constitutional power, full authority was possessed to make the prohibition effective, and the fact that such legislation had the character of a police regulation was no objection to its validity. In the case of Ruppert v. Caffey, 251 U. S. 264, 300, the Supreme Court held:

> "The implied war power (of Congress) over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors, but will effectively prevent their sale. When the United States exerts any of the power conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power."

Any attempted distinction between the character of the power possessed by the States over the subject of intoxicating liquor in the exercise of the police power and the nature of the power possessed by Congress under the Eighteenth Amendment is fundamentally unsound.

In Ruppert v. Caffey, 251 U. S. 264, 299, this principle is clearly and succinctly stated:

> "The police power of a State over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors, supported by a separate implied power to prohibit kindred non-intoxicating liquors so far as necessary to make the prohibition of intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intoxicating liquors."

THE AUTHORITY OF THE STATES TO PROHIBIT CERTAIN KINDS OF LIQUORS FOR MEDICINAL PURPOSES AND TO REGULATE THE MEDICINAL USE OF OTHER KINDS WELL ESTABLISHED.

Even where a Constitutional Amendment prohibits the sale of intoxicating liquors except for medical, scientific, and mechanical purposes the courts hold that the exceptions made cannot be construed to prevent the adequate enforcement of the prohibition against the use of such liquors for beverage purposes. This precise question was raised in the case of State v. Durein, 70 Kansas, 13, 80, Pac. 986, 15 L. R. A. (N. S.) 908, 905.

In a unanimous opinion of the court delivered by Judge Burch the authorities are reviewed and the following language is used:

> "The amendment to the Constitution of this State already quoted does not limit or abridge the power of the legislature further to prohibit the traffic in intoxicating liquor. It restrains the legislature in its power to tolerate only, and not in

> its power to suppress. * * * Therefore the status of the manufacture and sale of such liquors for medicinal, scientific, and mechanical purposes was in no manner fortified by the constitutional amendment, but it was left to be dealt with by the legislature as necessity might require, having particular regard to the complete suppression of manufacture and sale for beverage purposes."

This decision was later affirmed by the Supreme Court of the United States, January 13, 1908, 208 U. S. 613, 52 L. Ed., 645, 28 Su. Ct. Rep. 567.

In the later case of State v. Weiss, 84 Kans. 165, 113 Pac. 388, 36 L. R. A. (N. S.) 73, the court held:

> "The constitutional amendment forever prohibiting the manufacture and sale of intoxicating liquors in this State, except for medical, scientific, and mechanical purposes, is not a restriction upon the power of the legislature to prohibit by statute. In the absence of such amendment, the legislature would possess such power, and its authority is not diminished thereby."

Section 1 of the original prohibition law of Kansas permitted the sale of liquor for medicinal purposes.

In 1909 the legislature amended this section of the statute by striking out the provision that liquors might be sold for medicinal purposes. This was sustained in the case of State v. Miller, 92 Kan. 994; 142 Pac. 979.

In 1917 the Legislature of Kansas enacted the Bone Dry Law which prohibits the sale of anything save alcohol for medicinal purposes. Such sales are limited to druggists, hospitals and institutions authorized to receive. No provision is made for dispensing upon prescription. The validity of this act was upheld in the Case of State v. Mack, 104 Kan. 742, 180, P. 985.

This decision was also followed by the subsequent case of State v. Kurent, 105 Kan. 13, 181 P. 603, where the constitutionality of the statute was reaffirmed. It must be borne in mind that this is the status of law in a State where the State constitutional provision reads:

> "The manufacture and sale of intoxicating liquor shall be forever prohibited in this State, except for medicinal, scientific and mechanical purposes."

In 1886 Rhode Island adopted an amendment to the constitution of the State which in its wording was very similar to the language of the Eighteenth Amendment to the Constitution of the United States. In the case of State v. Kane, 15 R. I. 395, 6 Atl. 783, the question of the relation of the amendment to non-beverage liquor was before the Supreme Court of that State. It was held:

> "The fifth amendment to the constitution of Rhode Island provides: 'The manufacture and sale of intoxicating liquors, to be used as a beverage, shall be prohibited. The general assembly shall provide by law for carrying this article into effect. Held, this does not limit the power the general assembly previously had to pass a prohibitory law. Held, also, this does not impliedly license the manufacture and sale of intoxicating liquors for other purposes than as a beverage.' "

The Supreme Court of Rhode Island reaffirmed this view in the case of State v. Kennedy, 16 R. I. 409, 17 Atl. 51, wherein it was said:

"In State v. Kane, 15 R. I. 395, 6 Atl. Rep. 783, we carefully considered the point here raised, and expressed the opinion that while the fifth amendment to the constitution, commonly called the 'Prohibitory Amendment,' makes it obligatory on the general assembly to enact laws to prevent the sale of intoxicating liquors 'to be used as a beverage,' it does not take away from the general assembly, either expressly or by implication, the power which it previously had to restrict the sale, for other purposes, to certain persons or classes of persons; BUT RATHER ON THE CONTRARY, MAKES IT THEIR DUTY TO IMPOSE SUCH A RESTRICTION, IF, BY SO DOING, THEY CAN THE MORE EFFECTUALLY PREVENT THE SELLING AND KEEPING FOR SALE FOR USE AS A BEVERAGE. WE REMAIN OF THE OPINION THERE EXPRESSED, EXCEPTIONS OVERRULED." (CAPITALS OURS.)

In the case of Re. Crane, 27 Idaho 671, 151 P. 1006, L. R. A. 1918 A 942, the Supreme Court of Idaho in construing the law of that State, Session Laws 1915, Chapter 11, said:

"The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and PURE ALCOHOL TO BE USED FOR SCIENTIFIC OR MECHANICAL PURPOSES, OR FOR COMPOUNDING OR PREPARING MEDICINES, SO THAT THE POSSESSION OF WHISKEY OR OF ANY INTOXICATING LIQUOR, OTHER THAN WINE AND PURE ALCOHOL FOR THE USES ABOVE MENTIONED, IS PROHIBITED." (CAPITALS OURS.)

The Supreme Court of the United States, Dec. 10,

1917, sustained the validity of the statute, Crane v. Campbell, 245 U. S. 304, 62 L. Ed. 304, 38 Su. Ct. 98.

The CONSTITUTION OF ONE State, that of ARIZONA, as construed by the Supreme Court of that State prohibits the prescribing of alcohol or any form of intoxicating liquors. See Cooper v. State, 172 Pac. 276.

The legislative power to impose limitations and regulations upon the prescribing of medicinal liquor is also settled. Section 2, Article 16, of the Constitution of Michigan, reads:

> "The manufacture, sale, keeping for sale, giving away, bartering or furnishing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors except for medicinal, mechanical, chemical, scientific or sacramental purposes shall be after April thirty, nineteen hundred and eighteen, prohibited in the state forever. The Legislature shall by law provide regulations for the sale of such liquors for medicinal, mechanical, chemical, scientific and sacramental purposes."

The legislature by the Act of 1919 No. 53 limited the quantity of intoxicating liquor which a physician could prescribe to not to exceed eight ounces upon a single prescription. In People v. Urcavitch, 178 N. W. 225, the Supreme Court of Michigan said in answer to the alleged unconstitutionality of the Act:

> "We are of the opinion that these provisions open the way to one who is in need of intoxicating liquors for medicinal purposes to obtain the same. Of course, it may be said that the acquisition of it is preceded by much 'red tape,' but, as the Legislature has made it possible to secure it, the mere fact that it is hedged about with many safeguards would not result in making the law unconstitutional."

THIS COURT HAS REPEATEDLY UPHELD THE RIGHT OF CONGRESS TO REGULATE THE NON-BEVERAGE USE OF LIQUOR AS AN IMPLIED AND NECESSARY INCIDENT TO MAKE EFFECTIVE THE PROHIBITION UPON THE BEVERAGE USE OF INTOXICANTS.

In Selzman v. United States, 268 U. S. 466, this Court in upholding the right of Congress to regulate the distribution of denatured alcohol, although unfit for beverage use, said in answer to the contention that no such power was conferred by the Eighteenth Amendment empowering Congress to prohibit the beverage use of intoxicating liquors:

> "The power of the Federal government, granted by the 18th Amendment, to enforce the prohibition of the manufacture, sale, and transportation of intoxicating liquor, carries with it power to enact any legislative measures reasonably adapted to promote the purpose. The denaturing in order to render the making and sale of industrial alcohol compatible with the enforcement of prohibiton of alcohol for beverage purposes is not always effective. The ignorance of some, the craving and the hardihood of others, and the fraud and cupidity of still others, often tend to defeat its object. It helps the main purpose of the Amendment, therefore, to hedge about the making and disposition of the denatured article every reasonable precaution and penalty to prevent the proper industrial use of it from being perverted to drinking it. The conclusion is fully supported by the decisions of this court in Jacob Ruppert v. Caffey, 251 U. S. 264, 282, 64 L. Ed. 260, 266, 40 Supt. Ct. Rep. 141, and National Prohibition Cases (Rhode Island v. Palmer), 253 U. S. 350, No. 11, 64 L. ed. 946, 978, 40 Sup. Ct. Rep. 486, 588. See also Huth v. United States, 295 Fed. 35, 38."

FIFTH AMENDMENT IMPOSES NO GREATER LIMITATION UPON CONGRESS THAN FOURTEENTH AMENDMENT DOES UPON THE STATES.

In Hamilton vs. Kentucky Distilleries & Warehouse Company, 251 U. S. 146, 156-64 Ed. 194-199, Mr. Justice Brandeis said:

> "But the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power. (Re. Kemler, 136 U. S. 436, 448, 34 L. Ed. 519-524, 10 Su. Ct. Rep. 930; Carroll v. Greenwich Ins. Co., 199 U. S. 401, 410, 50 L. Ed. 246, 250, 26 Su. Ct. Rep. 66. If the nature and conditions of a restriction upon the use or disposition of property are such that a State could, under the police power, impose it consistently with the Fourteenth Amendment, without making compensation then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency."

THERE IS NO RIGHT TO PRACTICE MEDICINE WHICH IS NOT SUBORDINATE TO POLICE POWER.

This is well settled by the decisions of the United States Supreme Court. In Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 626, 9 Su. Ct. Rep. 231, Mr. Justice Field said in speaking of the validity of the West Virginia statute providing a license and fixing the conditions upon which physicians might practice:

"* * * But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. * * * The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. * * * The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected."

In Gray v. State of Connecticut, 159 U. S. 74, 40 L. Ed. 80, Mr. Justice Field in speaking for the Supreme Court in sustaining the validity of a liquor law which imposed additional qualifications upon a pharmacist already holding a license to practice pharmacy, said:

"A license to pursue any business or occupation, from the governing authority of any municipality or State, can only be invoked for the protection of one in the pursuit of such business or occupation, so long as the same continues unaffected by existing or new conditions. The degree of care and scrutiny which should attend the pursuit of the business or occupation practiced will necessarily depend upon the safety and freedom from injurious or dangerous conditions attending the prosecution of the same.

"In the preparation of medicinal compounds, intoxicating liquors and even still more dangerous ingredients are often properly used; but the protecting care of the government, municipal or State, in their use, should never be relaxed be-

yond the bounds of absolute safety. The responsibility of the legal authority, muncipal or State, cannot be stipulated or bartered away. Whatever provisions were prescribed by the law previous to 1890 in the use of spirituous liquors in the medicinal preparations of pharmacists, they did not prevent the subsequent exaction of further conditions which the lawful authority might deem necessary or useful.

"For reasons which were deemed sufficient after 1890 by the authorities of Connecticut, the use of spirituous liquors in the preparation of pharmacists' compounds required still further provisions than those previously existing, and it was provided that such liquors could not be subsequently used in their preparation without the pharmacist first procuring a druggist's license from the county commissioners.

"The imposition by the court of a fine upon the accused for a disregard of this requirement trespassed in no way upon any of his rights under the Constitution of the State or the 14th Amendment of the Federal Constitution."

In Watson v. Maryland, 218 U. S. 172, 54 L. Ed. 987, Mr. Justice Day said in sustaining the statute of Maryland relating to the practice of medicine:

"* * * The details of such legislation rest primarily within the discretion of the State legislature. It is the law-making body and the Federal courts can only interfere when fundamental rights guaranteed by the Federal Constitution are violated in the enactment of such statutes."

See also Reetz v. Michigan, 188 U. S. 505, 47 L. Ed. 563; Williams v. Arkansas, 217 U. S. 79, 54 L. Ed. 673; O'Neil v. State, 115 Tenn. 427, 90 S. W. 627, 3 L. R. A. (N. S.) 762; State v. Davis, 194 Mo. 485, 92 S. W. 484,

4 L. R. A. N. S. 1023; State v. Rosenkrans, 30 R. I. 374, 75 Atl. 491, affirmed 56 L. Ed. 1263; State v. Edmunds, 127 Iowa 333, 101 N. W. 431.

THE EIGHTEENTH AMENDMENT CONFERRED NO NEW RIGHT TO MANUFACTURE OR PRESORIBE INTOXICATING LIQUORS.

This question was conclusively settled by this Court in Hixson v. Oakes, 265 U. S. 254, 64 L. Ed. 1005.

THE POWER TO PROHIBIT THE MANUFACTURE OR PRESCRIBING OF LIQUOR ABSOLUTELY BEING ESTABLISHED IT NECESSARILY INCLUDES THE LESSER POWER TO PERMIT CONDITIONALLY.

This was the precise issue before the United States Supreme Court in the case of Clark Distilling Company v. Western Maryland R. Co., 242 U. S. 311, 61 L. Ed. 326. The facts in that case were that Congress, in the exercise of its power to regulate commerce among the States had enacted the Webb-Kenyon Law which provides:

> "* * * That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, territory, or district of the United States, * * * into any other State, Territory, or district of the United States, * * * which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or other-

> wise, in violation of any law of such State, territory, or district of the United States * * * is hereby prohibited."

It was insisted in that case, that while Congress had the power to prohibit the facilities of interstate commerce absolutely to the transportation of intoxicating liquor, nevertheless, it had exceeded its powers by prohibiting conditionally, or by leaving the determination of whether such prohibition should apply, to the States. Mr. Chief Justice White said there was absolutely no doubt about the power of Congress to prohibit the transportation absolutely under its constitutional authority to regulate commerce. Upon this subject he said:

> "It is not in the slightest degree disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce, and therefore had prevented all movement between the several States, such action would have been lawful, because within the power to regulate which the Constitution conferred. Lottery Case (Champion v. Ames), 188 U. S. 321, 13 Am. Crim. Rep. 561; Hoke v. United States, 227 U. S. 308, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913-E, 905."

In refuting the contention that the law was unconstitutional because Congress had not prohibited absolutely but merely conditionally, the Chief Justice said:

> "We can see no reason for saying that although Congress, in view of the nature and character of intoxicants, had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regu-

lation (which is what was done by the Webb-Kenyon Law) making it impossible for one State to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power."

Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445, 48 L. Ed. 1062, 24 Sup. Ct. Rep. 703; Rippey v. Texas, 193 U. S. 504, 48 L. Ed. 767, 24 Sup. Ct. Rep. 516; Southern Exp. Co. v. State, 188 Ala. 454, 66 So. 122; American Exp. Co. v. Beer, 107 Miss. 528, 65 So. 581, Ann. Cas. 1916 D. 127; State v. United States Exp. Co., 164 Ia. 112, 145 N. W. 451; State v. Doe, 92 Kan. 212, 139 Pac. 1170.

Every form of regulation implies a partial prohibition. The decisions of the State courts sustained by the United States Supreme Court clearly establish the right of a legislative body to prohibit absolutely the medicinal use of liquor in order to prevent the evils of the beverage use. The State statutes to this effect have been uniformly upheld. The power of Congress under the Eighteenth Amendment to make effective the prohibition upon the beverage use is no less than that of a State in the exercise of its police power. Merely because Congress has not seen fit to exert that power by laying an entire prohibition upon the prescribing of spirituous or vinous liquors for medicinal use but has seen fit to impose limitations not amounting to a complete prohibition constitute no valid constitutional objection to the provisions of the statute.

The characteristics of intoxicating liquor are such that it lends itself peculiarly to evasion of the law. It was both reasonable and necessary, if its sale was to be permitted for medicinal use, that regulations and conditions upon such use be imposed. The experience in the States demonstrated this. Because of this fact in nearly every state adopting prohibition prior to national prohibition the prescribing of liquor has been either prohibited altogether or limited to pure alcohol only.

EVIDENCE BEFORE CONGRESS SHOWED NECESSITY OF LIMITATIONS OF NATIONAL PROHIBITION ACT.

Congress is charged by the Eighteenth Amendment with the duty of enacting appropriate legislation for its enforcement. In legislating for the entire nation Congress adopted a much more liberal policy with reference to the prescribing of intoxicating liquors for medicinal purposes than obtained in a majority of the states which had adopted state prohibition prior to the ratification of the Eighteenth Amendment.

Experience in these states had shown the necessity for strictly regulating the use of intoxicating liquors for medicinal purposes if the prohibition upon the beverage use was to be made effective. Thus in twelve states, Arizona, Idaho, Maine, New Mexico, North Dakota, Georgia, Kansas, Nebraska, North Carolina, Utah, Washington and West Virginia *no intoxicating liquor of any kind may be prescribed,* while in ten states, Alabama, Arkansas, Delaware, Florida, Indiana, Mississippi, Oklahoma, Oregon, South Carolina, Tennesese and the territory of Alaska pure alcohol only may be prescribed. All of the above with the ex-

ception of Delaware having adopted prohibition prior to National Constitutional prohibition. In one state, North Dakota, a physician may not prescribe any intoxicating liquor but may personally administer not exceeding one pint to an individual patient within a period of ten days. Taking these groups together there is a total of twenty-three states and one territory where whisky, brandy, wine, etc., may not be prescribed because of local law.

In the foregoing states and territory the legislation has taken the form of an absolute prohibition of the prescribing of beverage liquors for medicinal purposes. Of the remaining twenty-six states in which intoxicating liquor may be prescribed, twenty of them have adopted some form of legislation regulating the issuance of prescriptions. Of this number fifteen have either the same limitation in the state law as the Federal law, or have, in effect adopted the limitations of the Federal law limiting the quantity of intoxicating liquor which may be prescribed to one pint for the same patient within a period of ten days. These states are California, Connecticut, Illinois, Iowa, Kentucky, Minnesota, Missouri, Montana, New Hampshire, New Jersey, Rhode Island, Vermont, Virginia, Wisconsin and Wyoming.

In three states the quantity of liquor which may be prescribed upon a single prescription is less than that permitted under the Federal law. In Colorado the quantity is limited to four ounces, in Michigan it is limited to eight ounces. There is no limitation upon the frequency of issuance, however. In Ohio the quantity is limited to one-half pint of pure grain alcohol or spiritous liquor within ten days.

One state, South Dakota, requires the physician to obtain a state permit, keep records, etc., but does not

fix the quantity that may be prescribed. Three states, Pennsylvania, Louisiana and Massachusetts, having enacted a state code for the enforcement of the Eighteenth Amendment, have no provisions regulating prescriptions, while three states, Maryland, Nevada and New York, have no state prohibitory laws, Maryland never having enacted any. In Nevada the statute attempting to adopt the National Prohibition Act by reference, was held unconstitutional by the Supreme Court. In New York the state law which contained the same limitations as the Federal law regarding prescriptions for liquor was repealed by the Legislature.

The necessity for limitations upon the authority of physicians to prescribe was the precise question which confronted Congress at the time the Supplemental Prohibition Act of November 23, 1921, was passed. The original Volstead act, Section 7, provided that "not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once."

In October, 1921, the Attorney General ruled that malt liquors and vinous liquors could be prescribed without any limitation save such as was imposed by the professional judgment of the physician (32 Opp. Attorney Genl 467). This would have permitted the prescribing of malt and vinous liquors without any restriction as to quantity or frequency. The Supplemental Prohibition Act was promptly passed by Congress to meet this situation and to provide limitations in the law, to safeguard against abuses. This act prohibited absolutely the prescribing of malt liquors and extended the same limitations with reference to the prescribing of vinous liquors that had obtained in the original Act with reference to spiritous liquors. The

constitutionality of this Act was sustained in Everard's Breweries vs. Day (Supra).

Congress by this situation was called upon to consider the necessity for limitations upon the prescribing of liquors for medicinal purposes. It was in evidence that, in twenty-four states, no physician could prescribe intoxicating liquors for medicinal purposes and that, out of a total of 152,627 physicians in the country at the time, seventy-eight per cent had not taken out permits to prescribe (See hearings before the Committee on the Judiciary, House of Representatives, 67th Congress, Serial 2 on H. R. 5033, pages 15 and 16). For evidence upon the necessity of limitations in the laws, see page 19, last paragraph. Also statement of Former Prohibition Commissioner Kramer, page 146, also debates in 67th Congress, statements by Senator Sterling July 8th, 1921, page 3456, Senator Walsh July 19, page 4035, Senator Willis July 19, page 4037, Senator Nelson July 19, page 4038, and speech of Mr. Volstead, August 16, p. 8746, relative to necessity for limitation and extended remarks, Aug. 23, p. 6055.

In the Appendix (page 37) there is set forth a table compiled from the annual reports of the Commissioner of Internal Revenue, showing the quantity of medicinal whiskey in proof gallons withdrawn annually from 1921 to 1925; also the number of permits issued annually for the corresponding period authorizing physicians to prescribe and retail druggists to fill prescriptions for medicinal liquor.

The drop in medicinal whiskey withdrawals from 8,671,860 proof gallons in 1921 to 2,654,506 proof gallons in 1922 was due in a large part to the improvement of the permit withdrawal system and the reduction in the number of forged permits to purchase and forged prescriptions. The low point was reached in

the year 1923 when the quantity was 1,754,893 proof gallons. There is a slight increase in withdrawals since, the total for 1925 being 1,923,537 proof gallons, with a substantial increase in the number of permits issued to prescribe and dispense. The number of physicians holding permits to prescribe increased from 36,859 in 1921 to 83,622 in 1925 and the number of retail druggists holding permits increased from 16,231 in 1921 to 19,866 in 1925. The closer check on all withdrawals that is now being maintained has reduced forgeries and frauds of like character. It is apparent that, with all restriction that can reasonably be placed around the medicinal whisky withdrawal system, that there is an upward curve in quantity withdrawn and in number of permittees involved.

Even with the limitations of existing law the American Medical Association at its meeting in Boston June 9, 1921, found it necessary to pass the resolution condemning the illegal prescribing of liquors. See Resolution set forth in the Appendix, p. 38.

The character of men seeking to enter the practice of pharmacy and conduct retail drug stores is a matter that is giving serious concern to leaders of pharmacy in the United States, and the situation is attributed largely to the fact that the retail drug store has the legal right to dispense liquor and narcotics upon prescription.

The Druggists Circular, one of the oldest and leading drug journals in the country, in its March, 1926, issue publishes the result of a Nation-wide referendum taken among the retail druggists of the country which shows that more than 80 per cent of the retail druggists favor petitioning Congress to relieve them of responsibility of dispensing liquor on prescription.

The New York State Pharmaceutical Association adopted a resolution at its annual convention in June, 1925, in which it declared that many of the current ills in pharmacy have resulted from the fact that the prohibition law designates retail pharmacists as the only legitimate distributors of medicinal liquor to the public and petitioned Congress to relieve pharmacy of that responsibility.

In October the proposal again came up for discussion, this time at the annual convention of New York (City) Pharmaceutical Conference and, somewhat modifying the introductory clauses, the pharmacists of the greater city expressed approval of the "New York proposal" and added their voices to the petition for amendment of the prohibition law. Since that time the Northern Ohio Retail Druggists' Association has "demanded that Congress take whiskey dispensing out of drug stores" and many pharmacists, through their local associations and individually, have expressed themselves in favor of amending the prohibition law so as to provide for the distribution of medicinal liquors.

THE NATIONAL PROHIBITION ACT IMPOSES NO RESTRICTIONS ON MEDICINAL INTOXICATING LIQUORS. ITS PROHIBITIONS APPLY ONLY TO SUCH LIQUORS ADMINISTERED IN BEVERAGE FORM.

It should be noted that where a physician wishes to prescribe more than one pint of spirituous liquor within a period of ten days, or to administer a quantity in excess of this amount, that in addition to the one pint of potable liquor permitted under Section 7, of the National Prohibition Act, such physician may pre-

scribe, or himself dispense, any quantity of spirituous liquor reasonably *medicated* so that it does not fall within the distinctly potable class. This might be readily availed of by those physicians who desire to prescribe liquors. The many who never prescribe liquor are not affected in the least.

This is succinctly stated by Judge Killetts in his opinion in the case of Price vs. Russell, 296 F. 263, 267, where he says:

> "It follows that there is no limitation upon either the prescription or administration of non-beverage intoxicating liquor. The pharmacopaeia and the National Formulary, which have statutory approval in section 4 of Title 2 of the act, as well as common experience instruct the physician in the compounding of a beverage intoxicating liquor with an ingredient, subject to his selection as innocuous in the specific case, which will deprive the result of palatability. Thus will his administration be taken beyond the scope of the law. We see nothing in the law which prevents resort to this expedient when alcoholic stimulant is indicated to the physician's judgment beyond the limitation of a half pint within ten days. This compounding may be done, as the profession knows, and it is also known to intelligent laymen, without deterioration of the expected thereapeutic effect of the administration, except in those rare and neglible cases where the palate is to be tickled as part of the treatment, and these Congress seems to have provided for in section 6, where medical attention to such appetites is legislatively considered.
>
> "We see no good reason, contemplating the course of decisions, justifying restrictive legislation that the exercise of this police power might be effective, some of which we have considered above, why Congress may not have legislated to prohibit the administration by physicians of beverage

liquors altogether, requiring the use of such medication, innocuous in the specific instances, as would render the prescription unpalatable. Congress, in our judgment and in the larger public interest, may burden the profession when the drug alcohol or a potable intoxicating liquor is indicated, with an obligation to make its administration directly. It is understood to be the drug effect of the alcohol in the medium employed which the phyisician seeks and not that which results from the beverage use, merely. It is not urged here that any other component of the intoxicating liquor sought to be administered is relied upon for its thereapeutic effect. What is complained of here, therefore, is not an improper limitation upon the exercise of professional obligation, but of a limitation of a mere privilege."

The case decided by Judge Ki. etts passed upon the specific question which is raised in the instant case. He sustained the validity of the restrictions in the law, declining to follow the earlier decisions by Judge Knox in the instant case, 291 F. 640, and Judge Bourquin in United States v. Freund, 290 F. 411. The reasoning of Judge Killetts upon the precise question involved in this case and the decisions of this court upon analogous questions in Hixson v. Oakes, 265 U. S. 264 and Everard's Breweries v. Day, 265 U. S. 554, are conclusive in favor of the Constitutionality of the statutes involved.

LEGISLATIVE ACTS ARE PRESUMED CONSTITUTIONAL. IN THE EXERCISE OF ITS POWER TO EFFECT A CONSTITUTIONAL PURPOSE CONGRESS IS THE JUDGE OF THE MEANS TO BE EMPLOYED AND THE NECESSITY WHICH OCCASIONS ITS EMPLOYMENT.

This Court in Everard's Breweries v. Day, 265 U. S. 554, said:

> "In enacting this legislation Congress has affirmed its validity. That determination must be given great weight; this court, by an unbroken line of decisions, having 'steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.' Adkins v. Children's Hospital, 261 U. S. 525, 544, 67 L. ed. 785, 790, 24 A. L. R. 1238, 43 Sup. Ct. Rep. 394."

The provisions of the Supplemental Prohibition Act which are challenged here are not simply a part of a general scheme of legislation enacted by Congress without due consideration. *The specific issue which Congress faced in the enactment of the Supplemental Prohibition Act was that of the necessity for providing regulations regarding th· prescribing of liquor* which had arisen by virtue of the Attorney General's decision. The Legislative body has acted. This Court has repeatedly reiterated the principle expressed in Hamilton v. Kentucky's Distilleries and Warehouse Company, 251 U. S. 146, where in construing the War prohibition it was held:

> "The Federal Supreme Court may not, in passing upon the validity of a Federal Statute, in-

quire into the motives of Congress, nor may it inquire into the wisdom of the legislation, nor may it pass upon the necessity for the exercise of a power possessed."

Before the Judicial Department will declare a statute unconstitutional it must appear that the statute is either arbitrary, unreasonable or has no real or substantial relation to making the Constitutional purpose effective. The difficulties always attendant upon the suppression of the liquor traffic are notorious. Crane v. Campbell, 245 U. S. 304, 307. The Federal government in enforcing prohibition is confronted with difficulties similar to those encountered by the states. Ruppert v. Caffey, 251 U. S. 264.

In view of experience and the evidence before the committee of Congress at the time the Act was passed, it can not be said that the statutes in question are either arbitrary, unreasonable or without relation to the purpose of making the prohibition upon the beverage use of intoxicants effective. The remedy of those who desire a change in existing regulation lies with the Legislative rather than the Judicial branch of the Government.

CONCLUSION

The points raised in this case have been settled by the decision of the U. S. Supreme Court. These decisions establishing—First that the evil sought to be prevented by the Eighteenth Amendment is the same as that which the States sought to suppress through the exercise of the police power. Ruppert v. Caffey, 251 U. S. 264, 297. U. S. v. Lanza, 260 U. S. 377, 381, 67 L. Ed. 314, 316.

Second—That the amendment conferred full power upon Congress to make prohibition effective and that the legislation enacted pursuant thereto may have the same characteristics as that enacted by the states under the police power. U. S. v. Lanza, Supra; Rhode Island vs. Palmer, 253 U. S. 350, 64 L. Ed. 946.

Third—That there is no right to practice medicine which is not subordinate to the police power. Hixson v. Oakes, 265 U. S. 264; Everard's Breweries v. Day, 265 U. S. 554; Gray v. State of Conn., 159 U. S. 74.

Fourth—That Congress is the judge of what constitutes appropriate legislation and that the judgment of the legislative body will not be interfered with unless it can be said to be plainly unreasonable, arbitrary, or without substantial relation to the purpose of the amendment. Everard's Breweries v. Day, 68 L. 81.

Fifth—That the Eighteenth Amendment conferred no new right to prescribe medicinal liquors. Hixson v. Oakes, 265 U. S. 264.

Sixth—That the states prior to the Eighteenth Amendment and Congress, in legislating for the territories, provided even more restictive legislation without violating any constitutional right. Everard's Breweries v. Day, 265 U. S. 554.

Seventh—That the judgment of the legislative body is entitled to respect. The 66th Congress which passed the original National Prohibition Act fixed the limitation upon spirituous liquors. The 67th Congress which passed the supplemental prohibition Act reiterated this judgment and extended the same limitation to vinous liquors. Everard's Breweries v. Day, 265 U. S. 554.

Eighth—That statutes are presumed to be constitutional, Everard's Breweries v. Day, 265 U. S. 554; Adkins v. Children's Hospital, 261 U. S. 525-544;

therefore, in view of the decisions of the Court, the experience of the states and of the Federal Government in the enforcement of prohibition, and the repeated judgment of Congress, expressed in legislation, the Courts cannot declare the limitations contained in the National Prohibition Act and Supplemental Prohibition Act to be in excess of the authority conferred by the Amendment.

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals, Second Circuit, in this case should be affirmed.

WAYNE B. WHEELER,
EDWARD B. DUNFORD,
Attorneys, Amici Curiae.

EXHIBIT "A"

EIGHTEENTH AMENDMENT

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

Section 7, Title II of the National Prohibition Act provides:

"No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the . .

person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word 'cancelled,' together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided.

"Every physician who issues a prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the commissioner, which shall show the date of issue, amount prescribed, to whom issued, the purpose or ailment for which it is to be used and directions for use, stating the amount and frequency of the dose."

Section 2 of the Supplemental Prohibition Act of November 23rd, 1921, in so far as pertinent provides:

"That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void. No physician shall prescribe, nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall anyone prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. No phys-

ician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall any physician issue more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinarly reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him."

EXHIBIT "B"

ANNUAL WITHDRAWAL OF MEDICINAL WHISKEY IN PROOF GALLONS

1921	8,671,860
22	2,654,506
23	1,754,893
24	1,813,178
25	1,923,537

NO. OF PERMITS TO PRESCRIBE ANNUALLY ISSUED TO PHYSICIANS

1921	36,859
22	44,346
23	57,597
24	65,982
25	83,622

NO. OF PERMITS TO DISPENSE ON PRESCRIPTION ANNUALLY ISSUED TO RETAIL DRUGGISTS.

1921	16,231
22	18,498
23	17,359
24	19,643
25	19,866

EXHIBIT "C"

Resolution adopted by the American Medical Association at its meeting in Boston, June 9, 1921:

> "Whereas reproach has been brought upon the medical profession by some of its members who have misused the law which permits the prescribing of alcohol; therefore be it
>
> Resolved, That the American Medical Association now expresses its disapproval of the acceptance of the position by a small minority of the profession, of being purveyors of alcoholic beverages."

SUPREME COURT OF THE UNITED STATES.

No. 47.—October Term, 1926.

Samuel W. Lambert, Appellant, *vs.* Edward C. Yellowley, et al. } Appeal from the United States Circuit Court of Appeals for the Second Circuit

[November 29, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

The National Prohibition Act, October 28, 1919, c. 85, Title II, § 7, 41 Stat. 305, 311 provides: "No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. . . . Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once." The supplemental Act of November 23, 1921, c. 134, § 2, 42 Stat. 222, has a related but broader restriction to which reference will be made later on. Violation of the provision subjects the offender to fine or imprisonment or both. The limitation as to amount applies only to alcoholic liquor "fit for use for beverage purposes." National Prohibition Act, Title II, § 1. "Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopoeia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes," and "patented, patent, and proprietary medicines that are unfit for use for beverage purposes," are specifically exempted from the operation of the provision. § 4(*b*) and (*c*). Moreover, the limitation does not apply to prescriptions for such liquor to be administered in certain hospitals. § 6.

In November, 1922, Samuel W. Lambert of New York City, a distinguished physician, brought in the federal court for that district, this suit to enjoin Edward Yellowley, the acting Federal Prohibition Director, and other officials, "from interfering with complainant in his acts as a physician in prescribing vinous or spirituous liquors to his patients for medicinal purposes, upon the

ground that the quantities prescribed for the use of any one person in any period of ten days exceed the limits fixed by said Acts, or either of them." As the basis for this relief the bill set forth Dr. Lambert's qualifications and experience as a physician; his belief that in certain cases, including some subject to his professional advice, the use of spirituous liquor internally as a medicine in an amount exceeding one pint in ten days is necessary for the proper treatment of patients in order to afford relief from human ailments; and that he does not intend to prescribe the use of liquor for beverage purposes. It alleged that to treat the diseases of his patients and to promote their physical well-being, according to the untrammelled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such medicines and medical treatment as in his opinion are best calculated to effect their cure and establish their health, is an essential part of his constitutional rights as a physician.

In May, 1923, the case was heard upon an application for an interlocutory injunction and a motion to dismiss. The District Court issued the injunction. 291 Fed. 640. In December, 1924, the United States Circuit Court of Appeals for the Second Circuit reversed the decree, and directed that the bill be dismissed. 4 F. (2d) 915. In the interval, this Court had decided *Hixon* v. *Oakes*, 265 U. S. 254, and *Everard's Breweries* v. *Day*, 265 U. S. 545. In the latter, Dr. Lambert's counsel was permitted to file a brief, and to present an oral argument. The appeal in the case at bar was taken under §§ 128 and 241 of the Judicial Code and was allowed before the passage of the Act of February 13, 1925, c. 229, 43 Stat. 936. The claim is that the provision assailed is unconstitutional, because it has no real or substantial relation to the appropriate enforcement of the Eighteenth Amendment; that in enacting the provision Congress exceeded the powers delegated to it by the Amendment; and that thereby complainant's fundamental rights are violated.

The Eighteenth Amendment, besides prohibiting by § 1 the manufacture, sale and transportation of intoxicating liquors for beverage purposes, confers upon Congress by § 2, in terms, the power to enforce the prohibition by appropriate legislation. That the limitation upon the amount of liquor which may be prescribed for medicinal purposes, is a provision adapted to promote the purpose of the amendment is clear. That the provision is not arbitrary appears

from the evidence considered by Congress[1] which embodies, among other things, the lessons of half a century of experience in the several States in dealing with the liquor problem.[2] That evidence disclosed that practicing physicians differ about the value of malt, vinous and spirituous liquors for medicinal purposes, but that the preponderating opinion is against their use for such purposes; and that among those who prescribe them there are some who are

[1]See House Report No. 224, 67th Cong., 1st Sess., Ser. No. 7920; Hearings before the Committee on the Judiciary of the House of Representatives on H. R. 5033, 15-16, 146; 61 Cong. Rec. 3456, 4035, 4036, 4038, 8749-8757.

[2]At the time of the passage of the National Prohibition Act, and/or the Willis-Campbell Act, the following state legislation concerning the prescription of alcoholic beverages for medicinal purposes was in effect. In 7 States no intoxicating liquor of any kind could be prescribed. Ariz. Const. Art. 23, Cooper *v.* State, 19 Ariz. 486; 1915 Ida. Laws, c. 11, 1921 Ida. Laws, c. 50; 1917 Kan. Laws, c. 215, State *v.* Miller, 92 Kan. 994, 1000; 1916 Me. Rev. Stat. c. 20, § 17; 1915 N. C. Laws, c. 97, § 8; 1917 Utah Laws, c. 2, § 30; 1917 Wash. Laws, c. 19, § 2. In 3 States prescriptions could be made only if the liquor was made unfit for beverage purposes. 1919 Ga. Laws, No. 139, § 4(b); 1917 Neb. Laws, c. 187, § 25; 1921 N. Dak. Laws, c. 97, § 2. In 15 States only alcohol could be prescribed for medical purposes. 1919 Ala. Acts, No. 7, §§ 5, 7; 1919 Ark. Laws, c. 87, § 17; 1919 Del. Laws, c. 291, §§ 8, 14; 1918 Fla. Laws, c. 7736, § 5, amended by 1919 Fla. Laws, c. 7890, § 1; 1917 Ind. Acts, c. 4, § 13; 1908 Miss. Laws, c. 113; N. Mex. Const. Art. 23, 1919 N. Mex. Laws, c. 151; 1919 Nev. Stats. c. 1, § 4; 1910-1911 Okla. Laws, c. 70, § 1; 1915 Ore. Laws, c. 141, § 6(g), as amended by 1917 Ore. Laws, c. 40, § 2, 1921 S. C. Crim. Code, §§ 797, 798; 1919 S. Dak. Rev. Code, §10273, as amended by 1919 S. Dak. Laws, c. 246, § 1; 1917 Tenn. Acts, No. 68, § 6; 1919 Tex. Laws, 2d Sess., c. 78, §§ 13, 14; 1921 W. Va. Acts, c. 115, amending c. 32A, § 4, Barnes' West Va. Code. In 3 States no more than a stated quantity of intoxicating liquor fit for beverage purposes can be prescribed at one time. 1915 Colo. Laws, c. 98, § 18; 1919 Mich. Acts, No. 53, § 19, People *v.* Urcavitch, 210 Mich. 431; 1918 Va. Acts, c. 388, § 13. In 11 States the standards of the federal law have been specifically adopted. 1921 Cal. Stats., c. 80; 1921 Ill Laws, pp. 681, 687, § 8; 1920 Ky. Acts, c. 81, § 23; 1919 Minn. Laws, c. 455, § 7, as amended by 1921 Minn. Laws, c. 391, § 7; 1921 Mont. Laws, Ex. Sess., c. 9, § 6; 1921 N. J. Laws, c. 150, § 44; 1921 N. Y. Laws, c. 155, § 1214; 1921 Ohio Laws, p. 194, § 1; 1921 Vt. Laws, No. 204, § 5; 1921 Wis. Laws, c. 441, § 1(9); 1921 Wyo. Laws, c. 117, § 7. In 2 States only physicians holding a federal permit may prescribe such liquors. 1921 Conn. Pub. Acts, c. 291, § 4; 1922 R. I. Acts, c. 2231, § 4. In New Hampshire no limitations are placed upon the prescribing physician, save exercise of professional skill and the employment of specific forms and the keeping of records. 1919 N. H. Laws, c. 99, § 2, amending 1917 N. H. Laws, c. 147, §§ 16, 17.

disposed to give prescriptions where the real purpose is to divert the liquor to beverage uses. Indeed, the American Medical Association, at its meeting in 1917, had declared that the use of alcoholic liquor as a therapeutic agent was without "scientific basis" and "should be discouraged", and, at its meeting in June, 1921, had adopted a resolution saying "reproach has been brought upon the medical profession by some of its members who have misused the law which permits the prescription of alcohol." With this as the situation to be met, the Judiciary Committee of the House of Representatives reported with favorable recommendation the bill which became the Act of November 23, 1921, whereby the prescription of intoxicating malt liquor for medicinal purposes is entirely prohibited, and the prescription of other intoxicating liquors is subjected to the following restrictions:

"No physician shall prescribe nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall any one prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall any physician issue more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinary reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him."

The Committee said, in reporting the bill (House Report No. 224, 67th Cong., 1st Sess.):

"Section 2 prohibits the use of beer as medicine and limits the alcoholic strength and the quantity of wine that may be prescribed. It also provides that no liquor shall be prescribed for use in any period of 10 days that contains more alcohol than that heretofore allowed. Under the national prohibition act 1 pint of beverage spirits can be prescribed. With the passage of this bill both spirituous and vinous liquor may be prescribed in one prescription, but the combined content of both liquors must not exceed one-half pint of alcohol. The purpose of this provision is not to increase the alcoholic content of the liquor that may be consumed, but to give physicians a choice between spirituous and vinous liquor within certain specified limits as to quantity.

"This section also writes into the law the present regulation as to the number of prescriptions that may be issued by a physician.

One hundred are allowed within a period of 90 days, but this may be exceeded in cases of extraordinary circumstances such as the prevalence of contagious or epidemic diseases. Under ordinary circumstances reputable physicians only write a small fraction of this number, and only about 22 per cent of the doctors hold permits to prescribe liquor of any kind, although they can be obtained without any fee, simply for the asking. There are a number of States in which the State laws prohibit physicians from prescribing liquor of any kind."

And also:

"While the majority of the States prohibit wine for medicinal purposes it was not deemed best by the committee that such provision should be inserted in the prohibition act at this time. In order, however, that this privilege should not be abused, it was deemed best to specifically limit its use, the same as has been done with spirituous liquor. Unless some limit is placed upon the amount of such liquors that may be prescribed, a number of physicians who do not have the high ethical standards of the large majority will abuse the privilege. Evidence was presented to the committee of physicians who issued hundreds of prescriptions within a few days when the total number of other prescriptions was a negligible number. In view of the fact that most of the States have more stringent provisions than the one contained in section 2, this legislation will work no hardship upon the profession."

In *Everard's Breweries* v. *Day*, 265 U. S. 545, the validity of the provision prohibiting the prescription of malt liquor was assailed as going beyond the power of Congress and impinging upon the reserved powers of the States, in that it is an interference with the regulation of health and the practice of medicine, both of which are within the domain of state power and outside the legislative power of Congress. The suit was against the Commissioner of Internal Revenue and other federal officers, and its chief purpose was to enjoin them from enforcing the provision prohibiting the prescription of malt liquor for medicinal purposes. This Court, besides observing that the "ultimate and controlling question" in the case was whether the provision prohibiting physicians from prescribing intoxicating malt liquors for medicinal purposes is within the power given to Congress by the Eighteenth Amendment, to enforce by "appropriate legislation" its prohibition of the manufacture, sale, etc., of intoxicating liquor for beverage purposes, proceeded to consider every phase of the question, and in conclusion held that the provision was appropriate legislation for

the purpose and within the power of Congress, although affecting subjects which, but for the Amendment, would be entirely within State control. The Court referred to the settled rule that where the means adopted by Congress in exerting an express power are calculated to effect its purpose, it is not admissible for the judiciary to inquire into the degree of their necessity, and then said (p. 560):

"We cannot say that prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth Amendment, and is not adapted to accomplish that end and make the constitutional prohibition effective. The difficulties always attendant upon the suppression of traffic in intoxicating liquors are notorious. *Crane* v. *Campbell*, 245 U. S. 304, 307. The Federal Government in enforcing prohibition is confronted with difficulties similar to those encountered by the States. *Ruppert* v. *Caffey, supra*, p. 297. The opportunity to manufacture, sell and prescribe intoxicating malt liquors for 'medicinal purposes', opens many doors to clandestine traffic in them as beverages under the guise of medicines; facilitates many frauds, subterfuges and artifices; aids evasion: and, thereby and to that extent, hampers and obstructs the enforcement of the Eighteenth Amendment."

The Court further held that Congress must be regarded as having concluded—as it well might do in the absence of any consensus of opinion among physicians and in the presence of the absolute prohibition in many of the States—that malt liquor has no substantial medicinal qualities making its prescription necessary; and that this made it impossible to say the provision was an unreasonable and arbitrary exercise of power.

We have spoken of that case at length because the decision was by a unanimous court and if adhered to disposes of the present case. If Congress may prohibit the manufacture and sale of intoxicating malt liquor for medicinal purposes by way of enforcing the Eighteenth Amendment, it equally and to the same end may restrict the prescription of other intoxicating liquor for medicinal purposes. In point of power there is no difference; if in point of expediency there is a difference, that is a matter which Congress alone may consider. Experience has shown that opportunities for doing what the Constitution forbids are present in both instances, and that advantage not infrequently is taken of these opportunities. Congress, in deference to the belief of a fraction of the medical profession that vinous and spirituous liquors have

some medicinal value, has said that they may be prescribed in limited quantities according to stated regulations; but it also has said that they shall not be prescribed in larger quantities, nor without conforming to the regulations, because this would be attended with too much risk of the diversion of the liquor to beverage uses. Not only so, but the limitation as to quantity must be taken as embodying an implicit congressional finding that such liquors have no such medicinal value as gives rise to a need for larger or more frequent prescriptions. Such a finding, in the presence of the well-known diverging opinions of physicians, cannot be regarded as arbitrary or without a reasonable basis. On the whole, therefore, we think it plain that the restrictions imposed are admissible measures for enforcing the prohibition ordained by the Eighteenth Amendment.

A later case applying like principles is *Selzman* v. *United States*, 268 U. S. 466. There a section of the National Prohibition Act forbidding the sale of denatured alcohol without a compliance with certain regulations was assailed as beyond the authority of Congress under the Eighteenth Amendment upon the ground that the Amendment relates only to traffic in intoxicating liquor for beverage purposes, and that, as denatured alcohol is not usable as a beverage, authority to prevent or regulate its sale is not given to Congress by the Amendment, but remains exclusively in the States. This Court held the section valid for the following reasons:

"The power of the Federal Government, granted by the Eighteenth Amendment, to enforce the prohibition of the manufacture, sale and transportation of intoxicating liquor carries with it power to enact any legislative measures reasonably adapted to promote the purpose. The denaturing in order to render the making and sale of industrial alcohol compatible with the enforcement of prohibition of alcohol for beverage purposes is not always effective. The ignorance of some, the craving and the hardihood of others, and the fraud and cupidity of still others, often tend to defeat its object. It helps the main purpose of the Amendment, therefore, to hedge about the making and disposition of the denatured article every reasonable precaution and penalty to prevent the proper industrial use of it from being perverted to drinking it."

From the authority of these cases Dr. Lambert seeks to escape by pointing out that he is a physician and believes that the use of spirituous liquor as a medicinal agent is at times both advisable

and necessary. He asserts that to control the medical practice in the States is beyond the power of the Federal Government. Of course his belief in the medicinal value of such liquor is not of controlling significance; it merely places him in what was shown to Congress to be the minor fraction of his profession. Besides, there is no right to practice medicine which is not subordinate to the police power of the States, *Dent* v. *West Virginia,* 129 U. S. 114; *Collins* v. *Texas,* 223 U. S. 288; *Crane* v. *Johnson,* 242 U. S. 339; *Graves* v. *Minnesota,* No. 320 of this term, decided November 22, and also to the power of Congress to make laws necessary and proper for carrying into execution the Eighteenth Amendment. When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by some or all of the incidents which attend the exercise by a State of its police power. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.,* 251 U. S. 146, 156; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, 300. The Eighteenth Amendment confers upon the Federal Government the power to prohibit the sale of intoxicating liquor for beverage purposes. Under it, as under the necessary and proper clause of Article I, § 8 of the Constitution, Congress has power to enforce prohibition "by appropriate legislation." High medical authority being in conflict as to the medicinal value of spirituous and vinous liquors taken as a beverage, it would, indeed, be strange if Congress lacked the power to determine that the necessities of the liquor problem require a limitation of permissible prescriptions, as by keeping the quantity that may be prescribed within limits which will minimize the temptation to resort to prescriptions as pretexts for obtaining liquor for beverage uses. Compare *Jacobson* v. *Massachusetts,* 197 U. S. 11.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court. U. S.

SUPREME COURT OF THE UNITED STATES.

No. 47.—October Term, 1926.

Samuel W. Lambert, Appellant, *vs.* Edward C. Yellowley, et al. } Appeal from the United States Circuit Court of Appeals for the Second Circuit.

[November 29, 1926.]

Mr. Justice Sutherland, dissenting.

The general design of the federal Constitution is to give to the federal government control over national and international matters, leaving to the several states the control of local affairs. Prior to the adoption of the Eighteenth Amendment, accordingly, the direct control of the manufacture, sale and use of intoxicating liquors *for all purposes* was exclusively under the police powers of the states; and there it still remains, save insofar as it has been taken away by the words of the Amendment. These words are perfectly plain and cannot be extended beyond their import without violating the fundamental rule that the government of the United States is one of delegated powers only and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The pertinent words of the Amendment are: ". . . the manufacture, sale, or transportation of intoxicating liquors . . . *for beverage purposes* is hereby prohibited." Plainly, Congress in submitting the Amendment, and the several states in ratifying it, meant to leave the question of the prohibition of intoxicating liquors for other than beverage purposes to the determination of the states, where it had always been. The limiting words of the Amendment are not susceptible of any other meaning; and to extend them beyond the scope of that meaning really is to substitute words of another and different import.

It is important also to bear in mind that "direct control of medical practice in the States is beyond the power of the Federal

Government." *Linder* v. *United States*, 268 U. S. 5, 18. Congress, therefore, cannot directly restrict the professional judgment of the physician or interfere with its free exercise in the treatment of disease. Whatever power exists in that respect belongs to the states exclusively.

The sole question which we are called upon to consider is whether the district court erred in denying the motion of the defendants to dismiss plaintiff's bill; and upon that question, of course, we are bound to accept as true all allegations of the bill which are well pleaded.

The suit was brought by a physician of distinction and, as the court below said, "of wide and unusual experience in the practice of medicine." He alleges that it is his opinion, based on experience, observation and medical study, that the use of spirituous liquors as medicine is, in certain cases, necessary in order to afford relief from known ailments; and that in the use of such liquors as medicine it is, in certain cases, including some now under his own observation and subject to his professional advice, necessary, in order to afford relief, that more than one pint of such liquor in ten days should be used internally and, in certain cases, necessary that it should be used without delay, notwithstanding that within a preceding period of less than ten days one pint of such liquor has already been used. He further alleges that in prescribing drugs and medicines the determination of the quantity involves a consideration of the physical condition of the patient and their probable effect in each specific case.

In addition to these allegations, we have the fact that Congress, acting upon a report of one of its committees made after exhaustive hearings, declared by statute that the prescription of malt liquors should be prohibited and the prescription of spirituous and vinous liquors should be permitted. Justifying such legislation, the committee had reported that the overwhelming evidence was to the effect that *malt* liquors [*not also spirituous and vinous liquors*] had no substantial medicinal value. It is now said by the majority, at one point, that the preponderating opinion of practicing physicians is against the use of all three and, at another point, that only a minor fraction hold the other view. I am quite unable to assent to these generalizations. On the contrary, the impossibility of determining, from anything now before this court, what is the preponderating opinion upon the subject, is very clear. An

examination of the hearings before the House Judiciary Committee, cited as authority for the foregoing statements, shows that the inquiry there was directed to the question of the medical value of *malt* liquors and that the question of the medical value of the other liquors was not under consideration. The hearings contain a few casual references to the other liquors; but I feel justified in saying that they reflect no light upon the state of medical opinion as to the value of such liquors as medicines. It is stated in the brief for the appellees that a questionnaire, sent out to one-third of the physicians of the United States, brought a reply from enough to make 21.5 per cent. of the whole number of physicians in the country, and that a little more than one-half of those replying voted "Yes" on the use of whiskey as a therapeutic agency, some of them, however, taking exception to the word "necessary," saying that no drugs were absolutely necessary. The American Medical Association, whose resolution of 1917 is referred to, have filed in this case a brief as *amicus curiae*, challenging the conclusion which is drawn from that resolution and vigorously attacking the Act now under review as arbitrary and unreasonable. In 1924 the House of Delegates of the Association adopted a resolution expressing its disapproval of those portions of the Act "which interfere with the proper relation between the physician and his patient in prescribing alcohol medicinally". It seems plain, therefore, that the most that can be said is that the question is of a highly controversial character; and, since it reasonably cannot be doubted that it is a fairly debatable one, the legislative finding, necessarily implicit in the Act, that vinous and spirituous liquors are of medicinal value, must be accepted here. *Radice* v. *New York*, 264 U. S. 292, 294; *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 357; *Price* v. *Illinois*, 238 U. S. 446, 452.

The majority opinion rests chiefly upon *Everard's Breweries* v. *Day*, 265 U. S. 545, which, it is said, was decided by a unanimous court and, if adhered to, disposes of the present case. While, of course, in the light of the present ruling, I cannot say that, if the court had entertained that view of the scope of its decision at the time of its rendition, it would not have been rendered; I do say it is very certain that it would not have been by a unanimous court. In the opinion in that case there is some general discussion of the power of Congress in respect of the adoption of appropriate means to enforce the Eighteenth Amendment, but the

decision rests upon the ground that Congress, upon conflicting evidence, had determined that *malt* liquors possessed no substantial medicinal value and judicial inquiry upon that question was, therefore, foreclosed. In direct response to the contention that the Act was an "arbitrary and unreasonable prohibition of the use of valuable medicinal agents," it was said (pp. 561-562):

"When the bill was pending in Congress the Judiciary Committee of the House of Representatives held an extended public hearing, in which it received testimony, among other things, on the question whether beer and other intoxicating malt liquors possessed any substantial medicinal properties. Hearings before House Judiciary Committee on H. R. 5033, Serial 2, May 12, 13, 16, 17, 20, 1921. On the information thus received the Committee recommended the passage of the bill. H. R., 67th Cong., 1st sess., Rep. No. 224. And in the light of all the testimony Congress determined, in effect, that intoxicating malt liquors possessed no substantial and essential medicinal properties which made it necessary that their use for medicinal purposes should be permitted, and that, as a matter affecting the public health, it was sufficient to permit physicians to prescribe spirituous and vinous intoxicating liquors in addition to the non-intoxicating malt liquors whose manufacture and sale is permitted under the National Prohibition Act."

And finally (p. 563):

"We find, on the whole, no ground for disturbing the determination of Congress on the question of fact as to the reasonable necessity, in the enforcement of the Eighteenth Amendment, of prohibiting prescriptions of intoxicating malt liquors for medicinal purposes. See Radice *v.* New York, 264 U. S. 292."

And so here, the legislative finding, implicit in the statute now under review, to the contrary effect, in respect of *spirituous* and *vinous* liquors, likewise should be accepted as controlling, and the *Everard's Breweries* case rejected as inapplicable.

As the record now stands, therefore, we must begin this inquiry with the assumption that vinous and spirituous liquors are in fact valuable medicines; and it necessarily follows that, at least as an end as distinguished from a means to an end, the prescription of such liquors in good faith for medicinal use cannot be prohibited *by Congress*, since that body lawfully cannot legislate beyond the grants of the Constitution. The report of the committee and the hearings will be searched in vain to find any suggestion that the quantity designated by the statute is adequate or that the com-

mittee or Congress gave any consideration to that question. The only fact in this record bearing upon that subject is the allegation, under oath, of appellant that in his professional opinion, based on experience, observation and medical study, more than that quantity, in certain cases, including some under his own observation and advice, is necessary. And, certainly, there is no basis for asserting the contrary in any fact or circumstance to be found outside the record of which this Court can take judicial notice.

The naked question, then, simply comes to this: Conceding these liquors to be valuable medicines, has Congress power, under the constitutional provision prohibiting traffic in intoxicating liquors for beverage purposes, to limit their prescription in good faith, and consequently their necessary use, for medicinal purposes, to a quantity which, under the allegations taken as true, is inadequate for such purposes? To me the answer seems plain. If Congress cannot altogether prohibit the prescription for medicinal use, it cannot limit the prescription to an inadequate quantity, for, obviously, in that case, *to the extent of the inadequacy*, the prohibition is as complete, and the usurpation of power as clear, as though the prohibition were unqualified. If the power exists to limit the quantity to a pint in ten days, it exists to limit the quantity to a tablespoonful or a teaspoonful or a few drops during the same or any other arbitrary period of time, with the result in substance and effect that the definite limitation of the prohibitory power by the words "for beverage purposes" vanishes altogether.

It is said that high medical authority is in conflict as to the medicinal value of spirituous and vinous liquors and [hence] it would be strange if Congress lacked power to determine that the necessities of the liquor problem require a reasonable limitation of the permissible prescriptions. This observation does more than beg the question,—it indulges an assumption the exact contrary of that which the record conclusively establishes, for the limitation of quantity is not only unsupported by any legislative finding that it is reasonable, but it is in flat opposition to the only facts appearing in the record which bear upon the question of what is a permissible prescription, and, therefore, is without rational basis, resting alone upon the arbitrarily exercised will of Congress. I do not see how it can be held otherwise without completely ignoring the

case as made and constructing and considering another and different case.

Nor is the opinion of the majority aided by the long list of state enactments cited to demonstrate that the present statute is not arbitrary, for, since the control of the medical practice is outside the province of the federal government and wholly within that of the states, *Linder* v. *United States*, *supra*, the powers of Congress in that field are not to be assimilated to those of the states.

By the legislation now under review, the authority of Congress is so exercised that the reserved power of the states to control the practice of medicine is directly invaded, to the illegitimate end that the prescription and use of liquors for medicinal purposes is prohibited. It is true that Congress has wide discretion in the choice of means to carry the granted power into effect; but the means not only must be appropriate to the end but must be such as "are not prohibited, but consist with the letter and spirit of the Constitution." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421. A grant of power to prohibit for specified purposes does not include the power to prohibit for other and different purposes. Congressional legislation directly prohibiting intoxicating liquor for concededly medical purposes, therefore, does not consist with the letter and spirit of the Constitution, and viewed as a means of carrying into effect the granted power is in fraud of that instrument, and especially of the Tenth Amendment. The words of Mr. Madison (Writings of James Madison, vol. 6, p. 367) are pertinent: "Nor can it ever be granted that a power to act on a case when it actually occurs, includes a power over all the means that may *tend to prevent* the occurrence of the case. Such a latitude of construction would render unavailing every practical definition of particular and limited powers."

The effect of upholding the legislation is to deprive the states of the exclusive power, which the Eighteenth Amendment has not destroyed, of controlling medical practice and transfer it in part to Congress. See *Hammer* v. *Dagenhart*, 247 U. S. 251, 275-276. It goes further, for if Congress can prohibit the prescription of liquor for necessary medical purposes as a means of preventing the furnishing of it for beverage purposes, that body, by a parity of reasoning, may prohibit the manufacture and sale for industrial or sacramental purposes, or, indeed, as the most effective possible means of preventing the traffic in it for beverage purposes, may prohibit such

manufacture and sale altogether, with the result that, under the pretense of adopting appropriate means, a carefully and definitely limited power will have been expanded into a general and unlimited power. "The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution." *Hammer* v. *Dagenhart*, *supra*, p. 276.

I do not doubt the authority of Congress to *regulate* the disposal of intoxicating liquors for medicinal use so as to prevent evasions of the law against the traffic in such liquors for beverage purposes, and to that end to surround the prescription by the physician with every appropriate safeguard against fraud and imposition; but as this record now stands it cannot *prohibit* the legitimate prescription of spirituous and vinous liquors for medicine as this statute attempts to do. "Federal power is delegated, and its prescribed limits must not be transcended even though the end seem desirable." *Linder* v. *United States*, *supra*, p. 22. Because this statute by fixing inadequate prescriptions prohibits to the extent of such inadequacies the legitimate prescription of spirituous and vinous liquors for medicinal purposes, it exceeds the powers of Congress, invades those exclusively reserved to the states, and is not appropriate legislation to enforce the Eighteenth Amendment. The decree below should be reversed.

Mr. Justice McReynolds, Mr. Justice Butler and Mr. Justice Stone concur in this opinion.